Supreme Court, U.S.
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In The
Supreme Court of the United States
October Term, 1995

IN RE: ANNE M. LAMM

Petitioner

Petition for Writ of Certiorari
To the North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the revocation of petitioner's license to practice law based on an ex parte finding that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law and without allowing her any opportunity to challenge this finding deprived her of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

PARTIES

The Petitioner is Anne M. Lamm. The Respondent is the North Carolina State Bar.

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No_____

In The
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IN RE: ANNE M. LAMM

Petitioner

Petition for Writ of Certiorari
To the North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner, Anne M. Lamm, respectfully prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court entered July 28, 1995.

OPINIONS BELOW

The Order of the Superior Court of Gaston County, North Carolina (App. p.18) was not reported. The opinion of the North Carolina Court of Appeals (App. p. 20) is reported at 116 N.C. App. 382 (1994). The opinion of the North Carolina Supreme Court (App. p.2) is reported at 341 N.C. 196 (1995).

JURISDICTION

The North Carolina Supreme Court entered judgement on July 28, 1995. This is the judgement sought to be reviewed. This Court has jurisdiction to review this judgement pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND BAR RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property without due process of law."

Article IV, § 5.i(6) of the Rules of the North Carolina State Bar which was in effect from November 1989 to 1994 provides:

> If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence of the Executive Director of the State Bar and either the Chairman or Director of PALS, a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said members of the Positive Action Committee may petition any Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its inherent power, suspending the lawyer's license to practice law in the State of North Carolina for a period of

time not to exceed 180 days, or in the alternative, transferring the lawyer to inactive status, for a like period of time.

By petition in the cause and upon a satisfactory showing, said license to practice law may be reinstated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

STATEMENT OF THE CASE

On Friday, April 30, 1993, Rachel Pickard, a member of the Positive Action for Lawyers Committee of the North Carolina State Bar, submitted to the Honorable Robert W. Kirby, Senior Resident Superior Court Judge for Gaston County, North Carolina, a Petition pursuant to Article VI, § 5.i.(6) of the Rules of the North Carolina State Bar, requesting an entry of an Order suspending Petitioner's license to practice law. After considering the Petition ex parte, the Court entered its Order finding as a fact and concluding as a matter of law that Petitioner was "drinking alcohol and using mood-altering drugs in sufficient amounts to impair her ability to practice law" (App. p.20) and suspending her license to practice law for 180 days or "until such earlier date as this Court shall find that [Petitioner] is no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law." Id. No

summons was ever issued and Petitioner received no notice of the proceedings until the Petition and Order were served on her the following Monday, May 3, 1993.

On June 11, 1993, Petitioner filed her N.C.R.Civ.P. 60(b)(4)[1] Motion and Motion to Set Aside Order (App. p.26) in which she moved that the Order of Suspension be set aside and she be allowed to Answer and be heard before any action was taken against her. This motion raised the issue that the failure to provide Petitioner with notice or an opportunity to be heard before finally depriving Petitioner of her law license violated the due process clause of the Fourteenth Amendment. (App. p.26). The tendered Answer, (App. p.26), denied that Petitioner was impaired. The Motion was heard in chambers. The Court heard the parties in argument and then denied the Motion without taking any evidence. This action denied Petitioner the right to file Answer and made final the ex parte determination of her unfitness. The Court did not make any ruling on the due process issue. (App. p.20). The Court then, on its own motion, pursuant to Article VI, § 5.i.(6) of the Rules of the North Carolina State Bar, considered whether Petitioner's license should be reinstated. (App. p.20). In its consideration of this matter the Court received testimony but made no findings of historical fact based on this testimony. The Court then

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[1]N.C.R.Civ.P. 60(b)(4) states in pertinent part:

> Relief from Judgement or Order
> ... (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and on such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: ...
> (4) The judgement is void.

found that Petitioner was "no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law." (Emphasis added). The Court then ordered that Petitioner's license to practice law be reinstated. (App. p.20).

Petitioner appealed to the North Carolina Court of Appeals and raised the issue that the suspension of her law license without any hearing being offered to her violated her rights to due process of law under the Fourteenth Amendment by assignment of error as follows:

> The court erred by entering its Order suspending [Petitioner's] license to practice law and by denying Petitioner's Rule 60(b)(4) Motion and Motion to Set Aside Order because: ...
>
> > 2. The course of proceedings below and Article VI, 5.i(6) of the North Carolina Bar have, by their failure to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, violated the Fourteenth Amendment to the United States Constitution and Article I, §19 of the North Carolina Constitution.

Record on Appeal to North Carolina Court of Appeals, at p. 28. The North Carolina Court of Appeals affirmed. In Re Lamm, 116 N.C.App. 382 (1994). (App. p.3). It held that suspending respondent's license without notice or an opportunity to be heard did not deprive her of due process because an adequate post-deprivation hearing had been accorded to her. (App. p.3). Judge (now North Carolina Supreme Court Justice)

Orr dissented because the hearing that was given was not a hearing on the deprivation, but rather a hearing on reinstatement. (App.p.14). Petitioner appealed and sought discretionary review in the North Carolina Supreme Court in apt time. Petitioner again raised the due process issue before the North Carolina Supreme Court. (Questions 1 and 2(b) of Petitioner's Notice of Appeal and Petition for Discretionary Review) (App. p.16). The Petitioner moved to dismiss. The petition for discretionary review was granted and the motion to dismiss was denied on February 10, 1995. The North Carolina Supreme Court affirmed the judgement of the North Carolina Court of Appeals per curiam without opinion on July 28, 1995.[2] (App. p.2).

ARGUMENT

THE REVOCATION OF PETITIONER'S LICENSE TO PRACTICE LAW BASED ON AN EX PARTE FINDING THAT SHE WAS USING ALCOHOL AND MOOD ALTERING DRUGS IN SUFFICIENT AMOUNTS TO IMPAIR HER ABILITY TO PRACTICE LAW WITHOUT ALLOWING HER ANY OPPORTUNITY TO CHALLENGE THIS FINDING DEPRIVED HER OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIO-

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[2]Respondent first raised issue before the North Carolina Supreme Court, that the case was moot because the petitioner's law license was reinstated and the State Bar rule had been changed so that ex parte suspension are now only possible in situations akin to those in which temporary restraining orders can be issued in civil cases. (A copy of the new Rule appears at App.p.31). However, because petitioner is faced with potential collateral legal consequences the case is not moot. Sibron v. New York, 392 U.S. 40, 20 L.Ed.2d 917 (1968). The North Carolina Supreme Court decided the case on its merits.

LATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The North Carolina State Bar Rule did not provide, and the Superior Court did not interpret the Rule to allow, any process by which Petitioner could challenge the Court's initial ex parte determination that her ability to practice law was impaired. Petitioner has never had any opportunity to challenge the determination that on April 30, 1993, her ability to practice law was impaired.

Whether Petitioner's law license is a "property" for Fourteenth Amendment purposes is to be determined by State law. Bishop v. Wood, 426 U.S. 341, 344-45, 48 L.Ed.2d 684 (1976). A law license is a property right under North Carolina law. In Re Burton, 257 N.C. 534, 543, 126 S.E.2d 581 (1962). There has, therefore, been a deprivation of property here.

As to what process is then due, some process is due once a State infringes a property interest. The Superior Court refused to allow Petitioner to file an Answer and declined to take evidence as to whether its ex parte Order was based in fact. This total lack of process to challenge the initial suspension of her license violated the due process clause because its affected a property interest without there being any process at all. In Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725 (1975), students were suspended from high school for ten days without being granted any hearing at all. The Court held that some process was required even for this level of governmental action, since it was more than de minimis. Id., at 576. The deprivation visited upon Petitioner is more onerous than a ten-

day suspension from school and obviously not de minimis.

Granting process is not an empty formula, but is vital to the truth-finding function of courts.

> "No better instrument has been derived for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."

Joint Anti-Fascist Committee v. McGrath, 431 U.S. 123, 170, 171-72, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

The Court in Goss v. Lopez said that process was needed because "things are not always as they seem to be." 419 U.S. at 584. So it is in the present case. Petitioner denied that there were good grounds to suspend her law license. (App. p.29). Fundamental fairness required that she have an opportunity to present her case before her license was suspended. In Re Lamm, 116 N.C. App. 382 (1994) (Orr, J., dissenting); Randall v. Brigham, 7 Wall. 523, 540, 19 L.Ed. 285, 293 (1869) (Justice Field) ("When not taken from matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense") (emphasis added); In Re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117 (1968) (due process requires prior notice and an opportunity to explain and defend against charges of attorney misconduct).

Petitioner respectfully requests that this Court issue its Writ of Certiorari to review the challenged decision of the North Carolina Supreme Court.

Respectfully submitted, this 26 day of October, 1995.

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IN THE SUPREME COURT OF NORTH CAROLINA

IN RE: ANNE M. LAMM,	)
	)
No. 539A94 - Gaston	)
Respondent	)

Appeal by respondent pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 116 N.C. App. 382, 448 S.E.2d 125 (1994), affirming an order entered by Kirby, J., on 17 June 1993 in Superior Court, Gaston County. On 9 February 1995, this Court allowed discretionary review of additional issues. Heard in the Supreme Court June 1995.

Carolin Bakewell for petitioner-appellee the North Carolina State Bar.

George Daly, P.A., by George Daly, for respondent-appellant.

PER CURIAM.

AFFIRMED.

Justices WEBB and ORR did not participate in the consideration or decision of this case.

No: 9327SC951 TWENTY-SEVENTH A DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

IN RE: ANNE M. LAMM,)
)
Respondent)
From Gaston County)
(No Superior Court Docket)
Number was assigned))

****

MARTIN, Judge.

The Positive Action for Lawyers Committee of the North Carolina State Bar was created in 1979 pursuant to an amendment to Article VI, Section 5.i. of the Rules, Regulations and Certificate of Organization of the North Carolina State Bar ("State Bar Rules") "for the purpose of implementing a program of intervention for lawyers with a substance abuse problem which affects their professional conduct...." See 302 N.C. 637 (1979). In 1989, Article VI, Section 5.i. was amended to add a new subsection (6) as follows, in pertinent part:

> (6) If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence

of the Executive Director of the State Bar and either the Chairman or Director of PALS, a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its inherent power, suspending the lawyer's license to practice law in the State of North Carolina for a period of time not to exceed 180 days, or in the alternative, transferring the lawyer to inactive status, for a like period of time.

By petition in the cause and upon a satisfactory showing, said license to practice law may be reinstated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

See 325 N.C. 750 (1989).

On 30 April 1992, two members of the Positive Action for Lawyers Committee ("PALS Committee"), Rachel Pickard and Robert L. Bradley, filed a verified petition pursuant to Article VI, Section 5.i.(6) requesting entry of an order suspending the law license of respondent on the ground that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law. In support of the petition, Pickard filed her own affidavit and the affidavit of the Clerk of

Superior Court for Gaston County. The petition also recited that the Executive Director of the State Bar and the Director of the PALS Committee concurred in petitioner's opinion. After considering the petition and affidavits in an ex parte hearing without notice to respondent or any opportunity for her to be heard, Judge Robert Kirby, Resident Superior Court Judge of Gaston County, entered an order the same day suspending respondent's license to practice law for 180 days "or until such earlier date as this Court shall find that [respondent] is no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law." Respondent was served with a copy of the affidavits and order on 3 May 1993. On 11 June 1993, respondent filed a motion requesting that the proceeding against her be declared void and be expunged and, alternatively, that the 30 April 1993 order be set aside and that she be allowed to file an answer and be heard before action was taken against her. After a hearing, Judge Kirby denied respondent's motions, but proceeded to hear evidence and determined that respondent had entered into a contract for treatment and was no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law. Judge Kirby ordered, pursuant to Article VI, Section 5.i.(6), that respondent's license be reinstated. Respondent appealed.

****

Respondent contends that the proceeding pursuant to Article VI, Section 5.i.(6) of the State Bar Rules, suspending her license to practice law without providing her with

presuspension notice or opportunity to be heard, deprived her of her right to due process under the Fourteenth Amendment to the United States Constitution and under Article I, § 19 of the North Carolina Constitution. "The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law." State v. McCleary, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983), affirmed, 311 N.C. 397, 316 S.E.2d 870 (1984). Article I, § 19 of the North Carolina Constitution is synonymous with "due process of law" as that term is applied under the Fourteenth Amendment to the federal Constitution. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); McNeil v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990), and United States Supreme Court interpretations of the latter, though not binding, are highly persuasive is construing the former. Watch Co. v. Brand Distributors, 285 N.C. 467, 206 S.E.2d 141 (1974). However, in deciding what procedural safeguards are due under Article I, § 19 of the North Carolina Constitution, the North Carolina Supreme Court has employed a somewhat different method of decision than that employed by the United States Supreme Court for deciding similar questions under the due process clause of the federal constitution. Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986). Accordingly we must examine the procedures prescribed by the State Bar Rule at issue, and particularly as applied to respondent in this case, to determine whether they comport with the requirement of due process under both

constitutions.

The parties agree that respondent's license to practice law constitutes a property interest which cannot be taken away without due process of law. See Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365 (1979); In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962). However, the parties disagree as to the requirement of due process in this situation. Respondent contends that due process required that she receive notice and opportunity to be heard prior to the entry of the 30 April 1993 order suspending her law license. The North Carolina State Bar contends that both Article VI, § 5.i.(6), and due process permit the order to be entered ex parte and provide the respondent with a sufficient immediate post deprivation remedy. We agree with the State Bar and affirm the order of the trial court.

Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual. Baugh v. Woodard, 604 F. Supp. 1529 (E.D.N.C. 1985), affirmed in part, vacated in part, 808 F.2d 333 (4th Cir. 1987); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976). Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved. Wilson v. Swing, 463 F.Supp. 555 (M.D.N.C. 1978); Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302 (W.D.N.C. 1974). In resolving any claimed violation of procedural due process, a balance must be struck between the respective interests of the individual and the gov-

ernmental entity seeking a remedy. Town of Hudson v. Martin-Kahill Ford, 54 N.C. App. 272, 283 S.E.2d 417 (1981), disc. review denied, 304 N.C. 733, 288 S.E.2d 804 (1982). "[E]ntitlement to a hearing does not automatically flow from a finding that procedural due process is applicable." Bowens v. Board of Law Examiners, 57 N.C. App. 78, 83, 291 S.E.2d 170, 173 (1982) quoting Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 49 L.Ed.2d 393 (1976). (Due process afforded by opportunity for failing bar applicants to be reexamined.) At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard. Bowens v. N.C. Dept. of Human Resources, 710 F.2d 1015 (4th Cir. 1983).

Where a predeprivation hearing is impractical and a post-deprivation hearing is meaningful, a State satisfies its due process obligation by providing the latter. Giglio v. Dunn, 732 F.2d 1133 (2d Cir. 1984), cert. denied, 469 U.S. 932, 83 L.Ed.2d 265 (1984); See Waltz v. Herlihy, 682 F.Supp. 501 (S.D.Ala. 1988), affirmed, 871 F.2d 123 (11th Cir. 1989). (Denial of presuspension hearing pursuant to statutes authorizing suspension of license to practice medicine because of dispensing controlled substances other than for legitimate medical purpose and because of inability to practice medicine with reasonable skill and safety due to use of chemicals did not constitute denial of due process.) Where the State has an important interest to protect and probable cause to believe that plaintiff poses a real and imme-

diate danger to that interest, interim or temporary emergency deprivation of a property right pending a prompt judicial or administrative hearing is constitutional. Barry v. Barchi, supra; Gershenfeld v. Justices of the Supreme Court of Pa., 641 F.Supp. 1419 (E.D.Pa. 1986).

The United States Supreme Court has established a three-factor balancing test to resolve the due process issue in this context:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safe-guards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed.2d 18, 53 (1976). Thus, we must first weigh the private interest affected by the challenged action. In this case, the private interest affected is respondent's interest in continued possession and use of her law license pending the outcome of a postsuspension hearing. The State Bar agrees that this is a substantial interest, and we recognize that any hardship suffered during delay between erroneous deprivation and postsuspension restoration cannot be undone. See Henry v. Edmisten, supra. Factors bearing on the weight of respondent's interest in continuous use of her

law license include the maximum revocation period and the timeliness of postsuspension review. Id.

Under Article VI, § 5.i.(6), these factors operate conjunctively. Although the maximum revocation period is 180 days, the rule provides for an abbreviated period depending upon the actions of the suspended attorney. The rule provides for reinstatement of the license as soon as the suspended attorney demonstrates that he or she is no longer drinking alcohol or using mood-altering drugs in a length of the revocation period is ostensibly within the immediate control of the suspended attorney.

Similarly, the rule provides for prompt postsuspension review, which may occur at any time upon petition of the suspended attorney. In this case, although respondent waited over a month to file her motions, the motions were heard and ruled upon within six days of filing. The availability of prompt postsuspension review, along with a relatively brief suspension period, reduces the weight of the private interest in a suspended attorney's continued use of his or her law license pending the outcome of the postsuspension hearing. See Mackey v. Montrym, 443 U.S. 1, 61 L.Ed.2d 321 (1979); Henry, supra.

Second, the balancing test requires us to weigh the risk of erroneous deprivation of respondent's private interest as a result of the procedures used and the probably value of additional procedural safeguards. However:

> Due process does not mean that governmental decision making must comply with standards that assure error-free determinations... When... prompt post deprivation review is available, what is generally required

> is no more than that the predeprivation procedures used be designed to provide a reasonably reliable basis for determining that the facts justifying the official action are as a responsible government official warrants them to be.

Henry, 315 N.C. at 484, 340 S.E.2d at 727-8. We believe that the predeprivation procedure set forth in Article VI, Section 5.i.(6) provides a reasonably reliable basis for determining that the facts justifying suspension are as alleged by the petitioning PALS members. The rule requires that at least two members of the PALS Committee have the opinion that a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his ability to practice law. This opinion must be concurred in by **either** the Chairman or Director of PALS **and** the Executive Director of the North Carolina State Bar. Additionally, the rule requires that the affidavit of at least two persons attesting to such impairment must accompany the petition. The petition and affidavits are then reviewed by a superior court judge who makes the final determination as to whether the facts require suspension of the lawyer's license to practice law.

Finally, we must weigh the State's interest served by the summary suspension procedure. The proceeding prescribed by Article VI, Section 5.i.(6) promotes the State's compelling interest in preventing an impaired lawyer from engaging in conduct detrimental to the public, the courts, or the legal profession. See State Bar Rules, Article VI, Section 5.i.(4). The summary and automatic character of the suspension is

reasonably related to the purpose of the rule, i.e., to protect the public from lawyers whose ability to practice has been impaired by substance abuse. Presuspension hearings requiring notice and opportunity to be heard would encourage dilatory tactics on the part of impaired lawyers to try to maintain their privilege to license, frustrating the purpose of the rule and creating a further risk of damage to his or her clients and the proper administration of justice.

A recitation here of the evidence presented to Judge Kirby in the preset case would serve no useful purpose, although we must review it to insure that appellant's rights were not violated by the rule as it was applied to her. It is sufficient to say that the evidence was substantial and is strikingly illustrative of the need for providing the State Bar's PALS program with an ability to move quickly to carry out the purposes of the rule.

In Henry v. Edmisten, supra, our North Carolina Supreme Court expressed dissatisfaction with the use of the "balancing test" to determine what due process is required under the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution. Id. at 490, 340 S.E.2d at 731. The Court promulgated the following principle as to the minimal requirements of due process required by the Law of the Land Clause:

> When the furtherance of a legitimate state interest requires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest, the law of the land ordi-

> narily requires no more than that before such action is undertaken, a judicial officer determine there is probable cause to believe that the conditions which would justify the action exist.

Id. at 494, 340 S.E.2d at 733. As we have discussed, after it has been demonstrated that an attorney is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, the State has a legitimate interest in prompt remedial action to prevent the present and future danger which such person poses to the proper operation of our legal system and those who rely upon it. The State Bar PALS procedure, as contained in the rule, provides for independent judicial review by a superior court judge, who must determine if the affidavits and petition establish a sufficient showing to justify a suspension. This procedure satisfies the requirements for sufficient process under the Law of the Land Clause of the North Carolina Constitution.

We note with approval that the Council of the North Carolina State Bar has, apparently as a result of the concerns raised by appellant in this case, proposed that Article VI, Section 5.i. of the State Bar Rules be revised to provide for presuspension notice and hearing except in emergency circumstances. See The North Carolina State Bar Newsletter, Vol. 19, No. 3, p.9. While we hold that the procedures prescribed by the current rule, and employed in this case, meet the minimal requirements of due process under our State and federal constitutions, we commend the State Bar for providing increased

safeguards for the rights of attorneys while continuing its efforts to protect the public from, and provide assistance to, practitioners impaired by alcoholism or other substance addictive illness.

In summary, the application of Article VI, Section 5.i(6) of the Rules of the North Carolina State Bar to the facts before us does not violate respondent's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution or the Law of the Land Clause of Article I, § 19 of the North Carolina State Constitution.

Affirmed.

Judge COZORT concurs.

Judge ORR concurs in part, and dissents in part.

Judge ORR concurring in part and dissenting in part.

While I do not disagree with the analysis employed by the majority as it applies to the issues dealing with pre-deprivation hearings and a meaningful post-deprivation hearing, I find the Rule at issue in this case constitutionally infirm in one respect. Although there is a post-deprivation process by which an attorney can have his or her license reinstated, there is no provision or procedure to determine if the initial unilateral action of suspension was in fact appropriate. A post-deprivation hearing that merely reinstates a suspended license, upon a finding that at the time of the hearing the attorney involved is not impaired, provides no meaningful opportunity to contest the results of the original process and the resulting sus-

pension. There should at a minimum be an opportunity for the affected party to challenge the initial action and the resulting suspension. For this reason, I concur in part and dissent in part.

No. 539A94 TWENTY-SEVENTH A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

IN RE: ANNE M. LAMM
From Gaston

****

NOTICE OF APPEAL
and
PETITION FOR DISCRETIONARY REVIEW
AS TO ADDITIONAL ISSUES
(Filed 25 October 1994)
(Allowed 9 February 1995)
and
MOTION TO DISMISS
(Filed 2 November 1994)
(Denied 9 February 1995)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Anne M. Lamm, Respondent-Appellant-Petitioner ("Appellant"), hereby appeals to the Supreme Court of North Carolina from the Judgment of the Court of Appeals of North Carolina, entered September 20, 1994 (copy attached).

This Judgment affirmed a decision of the Superior Court of Gaston County which had, on Petition of the Positive Action for Lawyers Committee of the North Carolina State Bar, ex parte found as a fact and concluded as a matter of law that Appellant was "drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law" (R p 10) and suspended her license to practice law. Id. On later Motion of Appellant (R p 12) the Superior Court refused to set this Order aside and refused to allow Appellant to file Answer and be heard on the merits of the Petition against her. (R p 19). On appeal the North Carolina Court of Appeals affirmed. Judge Robert F. Orr dissented based on the following issue:

> Question No. 1: Whether, in a proceeding pursuant to Article VI, § 5i(6) of the Rules, Regulations and Organization of the North Carolina State Bar, wherein the Superior Court ex parte upon the petition of the Positive Action for Lawyers Committee of the North Carolina State Bar found as a fact and concluded as a matter of law that Appellant was drinking alcohol and using mood-altering drugs in sufficient quantities to impair her ability to practice law and thereupon suspended

Appellant's license to practice law, the Superior Court erred and deprived Appellant of due process of law under Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution by denying Appellant's motion that its Order be set aside and she be allowed to file Answer and otherwise contest this matter on the merits, thereby depriving her of all opportunity to challenge her suspension from law practice.

Further, Appellant hereby appeals to the Supreme Court of North Carolina from this said Judgment of the Court of Appeals of North Carolina, which Judgment directly involves substantial questions arising under the Constitutions of the United States and the State of North Carolina, as follows:

Question No. 2: Whether (a) the Court of Appeals erred by deciding a constitutional issue that was not presented, namely be deciding whether a hearing after the fact of deprivation of Appellant's right to practice law was sufficient process when the hearing that was in fact held was not a post-deprivation hearing but was a hearing on reinstatement of Appellant's license; and (b) alternatively, whether the Court of Appeals erred in determining that Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution did not require that Appellant be given notice and an opportunity to be heard before the

Superior Court determined that she was unfit to practice law and suspended her license.

Question No. 3: Whether the Court of Appeals violated the Supremacy Clause of the United States Constitution, Article VI, cl. 2, by failing to apply In Re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117 (1968), in which the United States Supreme Court held that the due process clause of the Fourteenth Amendment requires no tice and an opportunity to be heard before an attorney may be disbarred.

Question No. 4: Whether the Court of Appeals failed to follow the decision of this Court in In Re Burton, 257 N.C. 534, 544 (1962), which held that due process of law requires that a proceeding by a Court to investigate alleged misconduct of an attorney must be initiated by a rule or order to show cause granting a reasonable time for answer and preparation of defense and then allowing full opportunity to be heard before judgement is rendered.

In the event that the Court finds these constitutional issues to be substantial, they are the issues which Appellant intends to present for review in her Brief, together with Question No. 1. These questions were each raised in the Superior Court by the Rule 60(b)(4) Motion and Motion to Set Aside Order (R p 12), which specifically claimed that the suspension of Appellant's license without prior opportunity to be heard violated both the State and Federal Constitutions, and by appropriate exceptions and assignments of error in the Record of Appeal.

****

STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON.
File No._____

IN RE ANNE M. LAMM,	)	ORDER
	)	
Respondent.	)	
(Filed Under Seal)_____	)	

This matter is before the Court on the Rule 60(b)(4) Motion and Motion to Set Aside Order ("the Motion"), filed June 11, 1993.

1. This is an action brought pursuant to Article VI, § 5i(6) of the Rules of the North Carolina State Bar ("the Rule"). This action was commenced on April 30, 1993, by the filing of a Verified Petition praying that Respondent's license to practice law be temporarily suspended pursuant to the Rule, and for other relief. The matter was heard ex parte that same day by the undersigned Judge Presiding, without notice to Respondent or any opportunity for her to be heard, as provided by Article VI, § 5i(6) of the Rules of the North Carolina State Bar. The Court, based upon the Petition and the Affidavits of Rachel Pickard and Betty B. Jenkins, Clerk of Superior Court of Gaston County, entered its Order of record, providing that

Respondent's license to practice law in the State of North Carolina was suspended for 180 days from the date of the Order, or until such earlier date as this Court should find that Respondent was no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law. A copy of this Order, of the Petition, and of the Affidavits was served on Respondent on or about May 3, 1993, by personal delivery to her from Petitioner Robert L. Bradley. The Respondent's Motion was filed on June 11, 1993, and heard that same day. Petitioners were represented at the hearing by Carolin Bakewell, Counsel for the North Carolina State Bar. Respondent was represented at the hearing by George Daly of the Charlotte, North Carolina Bar. Respondent and Attorney Edward Murrelle, Director of the North Carolina State Bar Positive Action for Lawyers Committee ("PALS Committee") were present at the hearing. Respondent's counsel had advised the State Bar on Monday, June 7, 1993, of Respondent's intention to file the Motion, and counsel and the Court conferred in a telephone conference call on the next day to schedule the hearing. The Motion was provided to the Court and counsel by facsimile transmission on Thursday, June 10, 1993. Petitioners have waived any further notice of motion to which they might be entitled.

2. At the hearing Respondent first brought on her Motion. After hearing the parties in argument, the Court denied the Motion. Respondent excepted.

3. The Court then considered whether, pursuant to the Rule, Respondent was "no longer drinking alcohol or us-

ing mood-altering drugs in sufficient amounts to impair his or her ability to practice law." In its consideration of this matter, the Court received testimony as follows:

(a) Respondent testified:

(i) that she had been a licensed attorney since 1969;

(ii) that she had no notice or opportunity to be heard before the Order herein was entered;

(iii) that she was presently an alcoholic;

(iv) that she was not presently addicted to mind-altering drugs, and has never been so;

(v) that she had not imbibed alcoholic beverages since April 25, 1993;

(vi) that she was taking, pursuant to prescription from a medical doctor, the drug sinequan, which was "mind-altering" in that it tends to suppress her mood swings;

(vii) that on May 23, 1993, she had voluntarily presented herself to The Life Center of Galax, Virginia, an alcoholic rehabilitation center, and had successfully completed its two-week program;

(viii) that she was currently attending the Dilworth Center for Chemical Dependency, in Charlotte, North Carolina and attending Alcoholics Anonymous meetings on a regular basis as advised by the Dilworth Center;

(ix) that since April 25, 1993, her memory, her presence of mind, and her ability to get along with people had substantially improved; and

(x) that in her opinion, from and after April 25, 1993, she was competent and capable of practicing law.

(b) The State Bar presented the testimony contained in the Affidavits of Rachel Pickard and Betty B. Jenkins, to which Respondent waived any objection as to hearsay or other objections, except that Respondent presented testimony (pertaining to Paragraph 2 of the Jenkins Affidavit) that Mr. Fletcher had not made the statement regarding Respondent's condition which is attributed to him in that Paragraph.

(c) Edward Murrelle testified for the State Bar:

(i) that he is a licensed North Carolina attorney in good standing and has been licensed to practice in this state since 1964;

(ii) that he has been the Director of the PALS Committee since 1988;

(iii) that he has attended four week-long workshops sponsored by the American Bar Association Impaired Lawyer Commission since 1988;

(iv) that he has been a trustee of the Blue Ridge Alcoholics Anonymous Retreat since 1986;

(v) that he represents Fellowship Hall, a treatment center for individuals suffering from substance abuse and addiction;

(vi) that he has worked with approximately 85 individuals suffering from alcoholism since becoming involved with the PALS Committee program;

(vii) that based upon his training and experience, it is his opinion that alcoholism is a chronic, progressive disease in which relapse is prevalent unless an ongoing treatment program is utilized;

(viii) that based upon his training and experience, attending an in-house treatment program is only the first step in recovering from alcoholism and that it is crucial that the patient continue follow up treatment, such as regularly attending Alcoholics Anonymous;

(ix) that before the PALS Committee sought an order suspending Lamm's license to practice law in April 1993, numerous attempts were made by PALS Committee volunteers over a period of approximately two years to persuade her to seek treatment for her alcoholism; and

(x) that the PALS Committee sought the order suspending Lamm's license to practice law only after Lamm rejected attempts by PALS Committee representatives to persuade her to seek treatment for her alcoholism and it appeared that her condition was worsening.

(d) Respondent testified on cross-examination:

(i) that she was charged with a third offense of driving while impaired on or about April 25, 1993; and

(ii) that she was voluntarily entered the detoxification unit of Mercy Hospital in Charlotte, North Carolina for treatment of alcoholism from April 26 to April 30, 1993.

The Court is informed that Lamm and the PALS Committee have entered into a contract for treatment.

Based upon the foregoing testimony, the Court finds as a fact that Respondent is no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law.

The Court thereupon concludes as a matter of law that:

1. Respondent's Motion should be denied; and

2. Respondent having entered a Contract for treatment, Respondent's license to practice law should be reinstated.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the license of Respondent Anne M. Lamm to practice law in the State of North Carolina shall be, and the same hereby is, **REINSTATED.**

The parties have consented that this Order may be entered out of County and out of term.

This 17 day of June, 1993.

/s/ Hon. Robert W. Kirby
Robert W. Kirby
Senior Resident Superior Court Judge for Gaston County

STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON.
File No._____

IN RE ANNE M. LAMM,	)	RULE 60(b)(4) MOTION
	)	and
Respondent.	)	MOTION TO SET ASIDE
	)	ORDER
_____	)	

(Filed Under Seal)

NOW COMES ANNE M. LAMM and respectfully shows:

1. On April 30, 1993, the attached Petition was filed. Upon information and belief no summons issued.

2. On April 30, 1993 the attached Order was entered.

3. On May 3 or May 4, 1993, Respondent received a copy of the Petition and Order and Affidavits by personal delivery from Robert Bradley. Previously she had no knowledge of either document. She has never been served with process in this action.

4. Prior to the institution of this action Respondent was a licensed North Carolina attorney in good standing.

5. Article VI, § 5i(6) of the Rules of the North Carolina State Bar, pursuant to which this proceeding is brought, is vague and overbroad and substantively arbitrary, in violation of Article I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

6. The course of proceeding herein and Article VI, § 5i(6) of the Rules of the North Carolina State Bar have, by their failure to give Respondent notice or an opportunity to be heard before being deprived of her liberty and property, violated the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

WHEREFORE, Respondent respectfully moves, pursuant to N.C.R.Civ.P. 60(b)(4) and the inherent power of the Court:

1. that this proceeding be declared void, and be expunged; and

2. that, alternatively, the Order herein be set aside, and Respondent be allowed to Answer (in the form attached), and be appropriately heard before any action be taken against her.

Respectfully submitted, this 11 day of June, 1993.

George Daly
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101 North McDowell Street, Suite 226
Charlotte, North Carolina 28204
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FAX: (704) 333-4465

Attorney for Petitioner

STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON. File No._____

IN RE ANNE M. LAMM,)
)
Respondent.) ANSWER TO PETITION
)
)
_____)

NOW COMES Respondent and, answering the Petition herein, respectfully says:

FIRST DEFENSE

Answering the numbered allegations of the Petition:

1. Admitted.
2. Denied.
3. Admitted.
4. It is not denied that the named persons have the opinion that they profess, but it is denied that Respondent is drinking alcohol or using mood altering drugs in any amount (except that Respondent is taking medically prescribed medications in the prescribed dosages) and it is denied that her ability to practice law is impaired.

5. Denied.

6. Denied.

SECOND DEFENSE

By failing to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, this proceeding has violated the Fourteenth Amendment to the United States Constitution.

THIRD DEFENSE

By failing to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, this proceeding has violated Article I, § 19 of the North Carolina Constitution.

FOURTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(1) for lack of jurisdiction over the subject matter.

FIFTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(2) for lack of jurisdiction over the person.

SIXTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(4) for insufficiency of process.

SEVENTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(5) for insufficiency of service of process.

EIGHTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

NINTH DEFENSE

Article VI, Section 5i(6) of the Rules of the North Carolina State Bar is unconstitutionally vague and overbroad in its provision that Respondent's license to practice law may be suspended or inactivated for "impair[ment]" of her ability to practice law, in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

TENTH DEFENSE

Article VI, Section 5i(6) of the Rules of the North Carolina State Bar is substantively arbitrary in its provision that Respondent's license to practice law may be suspended or inactivated for "impair[ment]" of her ability to practice law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, § 19 of the North Carolina Constitution.

ELEVENTH DEFENSE

Article VI, § 5i(6) of the Rules of the North Carolina State Bar is substantively arbitrary in not requiring that Respondent's ability to practice law be actually impaired before her license to practice law may be suspended or inactivated.

WHEREFORE, Petitioner respectfully prays that this proceeding be declared void, and be expunged, and that she recover her costs and have such other and further relief as is merited in the premises.

Respectfully submitted, this 11 day of June, 1993.

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N.C. Bar License No. 1071
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FAX: (704) 333-4465

Attorney for Petitioner

.0606 Suspension for Impairment, Reinstatement

If it appears that an attorney's ability to practice law has been impaired by drug or alcohol use, the committee may petition any superior court judge to issue an order in the court's inherent authority suspending the attorney's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the attorney's impairment.

(b) The petition shall be signed by the executive director of the committee and the executive director of the North Carolina State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear within 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar will have the burden of proving by clear, cogent and convincing evidence that the attorney's ability to practice law has been impaired by drug or alcohol use.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from filing of the petition, unless the suspended attorney agrees to a continuance. At the hearing, the suspended attorney will have the burden of establishing by clear, cogent, and convincing evidence that his or her ability to practice law is not impaired by drug or alcohol use and, if impairment has previously existed, that the threat of impairment from drug or alcohol use has been and is being

treated and/or managed to minimize the danger to the public from a reoccurrence of drug or alcohol impairment.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless:

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending ex parte the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to endorse an emergency order hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

FILED

(1) 94 OCT 26 1995

OFFICE OF THE CLERK

No._____

In The
Supreme Court of the United States
October Term, 1995

IN RE: ANNE M. LAMM

Petitioner

Petition for Writ of Certiorari
To the North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

GEORGE DALY
Counsel of Record for Petitioner

GEORGE DALY, P.A.
Suite 226, 101 North McDowell St.
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QUESTION PRESENTED

Whether the revocation of petitioner's license to practice law based on an ex parte finding that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law and without allowing her any opportunity to challenge this finding deprived her of property without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

PARTIES

The Petitioner is Anne M. Lamm. The Respondent is the North Carolina State Bar.

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No_____

In The

Supreme Court of the United States

October Term, 1995

IN RE: ANNE M. LAMM

Petitioner

Petition for Writ of Certiorari

To the North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

Petitioner, Anne M. Lamm, respectfully prays that a Writ of Certiorari issue to review the judgment of the North Carolina Supreme Court entered July 28, 1995.

OPINIONS BELOW

The Order of the Superior Court of Gaston County, North Carolina (App. at 18) was not reported. The opinion of the North Carolina Court of Appeals (App. at 20) is reported at 116 N.C.App. 382 (1994). The opinion of the North Carolina Supreme Court (App. at 2) is reported at 341 N.C. 196 (1995).

JURISDICTION

The North Carolina Supreme Court entered judgment on July 28, 1995. This is the judgement sought to be reviewed. This Court has jurisdiction to review this judgement pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISIONS AND BAR RULES INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> "[N]or shall any State deprive any person of life, liberty, or property without due process of law."

Article IV, § 5.i(6) of the Rules of the North Carolina State Bar which was in effect from November 1989 to 1994 provides:

> If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence of the Executive Director of the State Bar and either the Chair man or Director of PALS, a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said members of the Positive Action Committee may petition any Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its in herent power, suspending the lawyer's license to practice law in the State of North Carolina for a period of

time not to exceed 180 days, or in the alternative, transferring the lawyer to inactive status, for a like period of time.

By petition in the cause and upon a satisfac tory showing, said license to practice law may be rein stated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

STATEMENT OF THE CASE

On Friday, April 30, 1993, Rachel Pickard, a member of the Positive Action for Lawyers Committee of the North Carolina State Bar, submitted to the Honorable Robert W. Kirby, Senior Resident Superior Court Judge for Gaston County, North Carolina, a Petition pursuant to Article VI, § 5.i.(6) of the Rules of the North Carolina State Bar, requesting an entry of an Order suspending Petitioner's license to practice law. After considering the Petition ex parte, the Court entered its Order finding as a fact and concluding as a matter of law that Petitioner was "drinking alcohol and using mood-altering drugs in sufficient amounts to impair her ability to practice law" (App. p.20) and suspending her license to practice law for 180 days or "until such earlier date as this Court shall find that [Petitioner] is no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law." Id. No

summons was ever issued and Petitioner received no notice of the proceedings until the Petition and Order were served on her the following Monday, May 3, 1993.

On June 11, 1993, Petitioner filed her N.C.R.Civ.P. 60(b)(4)[1] Motion and Motion to Set Aside Order (App. p.26) in which she moved that the Order of Suspension be set aside and she be allowed to Answer and be heard before any action was taken against her. This motion raised the issue that the failure to provide respondent with notice or an opportunity to be heard before finally depriving respondent of her law license violated the due process clause of the Fourteenth Amendment. (App. 26). The tendered Answer, App. 26, denied that respondent was impaired. The Motion was heard in chambers. The Court heard the parties in argument and then denied the Motion without taking any evidence. This action denied Petitioner the right to file Answer and made final the ex parte determination of her unfitness. The Court did not make any ruling on the due process issue. (App. at 20). The Court then, on its own motion, pursuant to Article VI, § 5.i.(6) of the Rules of the North Carolina State Bar, considered whether Petitioner's license should be reinstated. (App. p.20). In its consideration of this matter the Court received testimony but made no findings of historical fact based on this testimony. The Court then

---

[1]N.C.R.Civ.P. 60(b)(4) states in pertinent part:

> Relief from Judgement or Order
> ... (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and on such terms as are just, the court may relieve a party or his legal representative from a final judgement, order, or proceeding for the following reasons: ...
> (4) The judgement is void.

found that Petitioner was "no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law." (emphasis added). The Court then ordered that Petitioner's license to practice law be reinstated. (App. p.20).

Petitioner appealed to the North Carolina Court of Appeals and raised the issue that the suspension of her law license without any hearing being offered to her violated her rights to due process of law under the Fourteenth Amendment by assignment of error as follows:

> The court erred by entering its Order suspending [Respondent's] license to practice law and by denying Respondent's Rule 60(b)(4) Motion and Motion to Set Aside Order because: ...
>
> > 2. The course of proceedings below and Article VI, 5.i(6) of the North Carolina Bar have, by their failure to give Respondent notice or an opportunity to be heard before being deprived of her liberty and property, violated the Fourteenth Amendment to the United States Constitution and Article I, §19 of the North Carolina Consti tution.

Record on Appeal to North Carolina Court of Appeals, at pg. 28. The North Carolina Court of Appeals affirmed. In Re Lamm, 116 N.C.App. 382 (1994). (App. at 3) It held that suspending respondent's license without notice or an opportunity to be heard did not deprive her of due process because an adequate post- deprivation hearing had been accorded to her. (App. 3). Judge (now North Carolina Supreme Court Justice)

Orr dissented because the hearing that was given was not a hearing on the deprivation, but rather a hearing on reinstatement. (App. at 14). Petitioner appealed and sought discretionary review in the North Carolina Supreme Court in apt time. Petitioner again raised the due process issue before the North Carolina Supreme Court. (Questions 1 and 2(b) of Petitioner's Notice of Appeal and Petition for Discretionary Review) (App. pg.16). The Respondent moved to dismiss. The petition for discretionary review was granted and the motion to dismiss was denied on February 10, 1995. The North Carolina Supreme Court affirmed the judgement of the North Carolina Court of Appeals per curiam without opinion on July 28, 1995.[2] (App. p.2).

ARGUMENT

THE REVOCATION OF PETITIONER'S LICENSE TO PRACTICE LAW BASED ON AN EX PARTE FINDING THAT SHE WAS USING ALCOHOL AND MOOD ALTERING DRUGS IN SUFFICIENT AMOUNTS TO IMPAIR HER ABILITY TO PRACTICE LAW WITHOUT ALLOWING HER ANY OPPORTUNITY TO CHALLENGE THIS FINDING DEPRIVED HER OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The North Carolina State Bar Rule did not provide, and the Superior Court did not interpret the Rule to allow, any process by which Petitioner could challenge the Court's initial ex parte determination that her ability to practice law was im-

paired. Petitioner has never had any opportunity to challenge the determination that on April 30, 1993, her ability to practice law was impaired.

Whether Petitioner's law license is a "property" for Fourteenth Amendment purposes is to be determined by State law. Bishop v. Wood, 426 U.S. 341, 344-45, 48 L.Ed.2d 684 (1976). A law license is a property right under North Carolina law. In Re Burton, 257 N.C. 534, 543, 126 S.E.2d 581 (1962). There has, therefore, been a deprivation of property here.

As to what process is then due, some process is due once a State infringes a property interest. The Superior Court refused to allow Petitioner to file an Answer and declined to take evidence as to whether its ex parte Order was based in fact. This total lack of process to challenge the initial suspension of her license violated the due process clause because its affected a property interest without there being any process at all. In Goss v. Lopez, 419 U.S. 565, 42 L.Ed.2d 725 (1975), students were suspended from high school for ten days without being granted any hearing at all. The Court held that some process was required even for this level of governmental action, since it was more than de minimis. Id., at 576. The deprivation visited upon Petitioner is more onerous than a ten-

---

Respondent first raised issue before the North Carolina Supreme Court, that the case was moot because the petitioner's law license was reinstated and the State bar rule had been changed so that ex parte suspension are now only possible in situations akin to those in which temporary restraining orders can be issued in civil cases. (A copy of the new Rule appears at App. 31). However, because petitioner is faced with potential collateral legal consequences the case is not moot. Sibron v. New York, 392 U.S. 40, 20 L.Ed.2d 917 (1968). The North Carolina Supreme Court decided the case on its merits.

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day suspension from school and obviously not de minimis.

Granting process is not an empty formula, but is vital to the truth-finding function of courts.

> "No better instrument has been derived for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it."

Joint Anti-Fascist Committee v. McGrath, 431 U.S. 123, 170, 171-72, 95 L.Ed. 817 (1951) (Frankfurter, J., concurring).

The Court in Goss v. Lopez said that process was needed because "things are not always as they seem to be." 419 U.S. at 584. So it is in the present case. Petitioner denied that there were good grounds to suspend her law license. (App. at 29). Fundamental fairness required that she have an opportunity to present her case before her license was suspended. In Re Lamm, 116 N.C. App. 382 (1994) (Orr, J., dissenting); Randall v. Brigham, 7 Wall. 523, 540, 19 L.Ed. 285, 293 (1869) (Justice Field) ("When not taken from matters occurring in open court, in the presence of the judges, notice should be given to the attorney of the charges made, and opportunity afforded him for explanation and defense.") (emphasis added); In Re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117 (1968) (due process requires prior notice and an opportunity to explain and defend against charges of attorney misconduct).

Petitioner respectfully requests that this Court issue its Writ of Certiorari to review the challenged decision of the North Carolina Supreme Court.

Respectfully submitted, this 26 day of October, 1995.

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IN THE SUPREME COURT OF NORTH CAROLINA

IN RE: ANNE M. LAMM,)
)
No. 539A94 - Gaston)
Respondent)

Appeal by respondent pursuant to N.C.G.S. § 7A-30(2) from the decision of a divided panel of the Court of Appeals, 116 N.C. App. 382, 448 S.E.2d 125 (1994), affirming an order entered by Kirby, J., on 17 June 1993 in Superior Court, Gaston County. On 9 February 1995, this Court allowed discretionary review of additional issues. Heard in the Supreme Court June 1995.

Carolin Bakewell for petitioner-appellee the North Carolina State Bar.

George Daly, P.A., by George Daly, for respondent-appellant.

PER CURIAM.

AFFIRMED.

Justices WEBB and ORR did not participate in the consideration or decision of this case.

No: 9327SC951 TWENTY-SEVENTH A DISTRICT

NORTH CAROLINA COURT OF APPEALS

****

IN RE: ANNE M. LAMM,	)
	)
Respondent	)
From Gaston County	)
(No Superior Court Docket	)
Number was assigned)	)

****

MARTIN, Judge.

The Positive Action for Lawyers Committee of the North Carolina State Bar was created in 1979 pursuant to an amendment to Article VI, Section 5.i. of the Rules, Regulations and Certificate of Organization of the North Carolina State Bar ("State Bar Rules") "for the purpose of implementing a program of intervention for lawyers with a substance abuse problem which affects their professional conduct...." See 302 N.C. 637 (1979). In 1989, Article VI, Section 5.i. was amended to add a new subsection (6) as follows, in pertinent part:

> (6) If in the opinion of no less than two (2) members of the Positive Action for Lawyers Committee of the North Carolina State Bar and with the concurrence

> of the Executive Director of the State Bar and either the Chairman or Director of PALS, a lawyer is drinking al cohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, said Superior Court Judge, based upon the affidavit of at least two (2) persons attesting to such impairment of the lawyer, requesting an order of the Court, in its in herent power, suspending the lawyer's license to prac tice law in the State of North Carolina for a period of time not to exceed 180 days, or in the alternative, trans ferring the lawyer to inactive status, for a like period of time.
>
> By petition in the cause and upon a satisfactory showing, said license to practice law may be reinstated, or the transfer to inactive status may be rescinded, at an earlier date upon a finding by the Court that the lawyer is no longer drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law.

See 325 N.C. 750 (1989).

On 30 April 1992, two members of the Positive Action for Lawyers Committee ("PALS Committee"), Rachel Pickard and Robert L. Bradley, filed a verified petition pursuant to Article VI, Section 5.i.(6) requesting entry of an order suspending the law license of respondent on the ground that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law. In support of the petition, Pickard filed her own affidavit and the affidavit of the Clerk of

Superior Court for Gaston County. The petition also recited that the Executive Director of the State Bar and the Director of the PALS Committee concurred in petitioners' opinion. After considering the petition and affidavits in an ex parte hearing without notice to respondent or any opportunity for her to be heard, Judge Robert Kirby, Resident Superior Court Judge of Gaston County, entered an order the same day suspending respondent's license to practice law for 180 days "or until such earlier date as this Court shall find that [respondent] is no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law." Respondent was served with a copy of the affidavits and order on 3 May 1993. On 11 June 1993, respondent filed a motion requesting that the proceeding against her be declared void and be expunged and, alternatively, that the 30 April 1993 order be set aside and that she be allowed to file an answer and be heard before action was taken against her. After a hearing, Judge Kirby denied respondent's motions, but proceeded to hear evidence and determined that respondent had entered into a contract for treatment and was no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law. Judge Kirby ordered, pursuant to Article VI, Section 5.i.(6), that respondent's license be reinstated. Respondent appealed.

****

Respondent contends that the proceeding pursuant to Article VI, Section 5.i.(6) of the State Bar Rules, suspending her license to practice law without providing her with

presuspension notice or opportunity to be heard, deprived her of her right to due process under the Fourteenth Amendment to the United States Constitution and under Article I, § 19 of the North Carolina Constitution. "The Fifth and Fourteenth Amendments to the United States Constitution, together with the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution, provide that no person shall be deprived of life, liberty or property without due process of law." State v. McCleary, 65 N.C. App. 174, 180, 308 S.E.2d 883, 888 (1983), affirmed, 311 N.C. 397, 316 S.E.2d 870 (1984). Article I, § 19 of the North Carolina Constitution is synonymous with "due process of law" as that term is applied under the Fourteenth Amendment to the federal Constitution. In re Moore, 289 N.C. 95, 221 S.E.2d 307 (1976); McNeil v. Harnett County, 327 N.C. 552, 398 S.E.2d 475 (1990), and United States Supreme Court interpretations of the latter, though not binding, are highly persuasive is construing the former. Watch Co. v. Brand Distributors, 285 N.C. 467, 206 S.E.2d 141 (1974). However, in deciding what procedural safeguards are due under Article I, § 19 of the North Carolina Constitution, the North Carolina Supreme Court has employed a somewhat different method of decision than that employed by the United States Supreme Court for deciding similar questions under the due process clause of the federal constitution. Henry v. Edmisten, 315 N.C. 474, 340 S.E.2d 720 (1986). Accordingly we must examine the procedures prescribed by the State Bar Rule at issue, and particularly as applied to respondent in this case, to determine whether they comport with the requirement of due process under both

constitutions.

The parties agree that respondent's license to practice law constitutes a property interest which cannot be taken away without due process of law. See Barry v. Barchi, 443 U.S. 55, 61 L.Ed.2d 365 (1979); In re Burton, 257 N.C. 534, 126 S.E.2d 581 (1962). However, the parties disagree as to the requirement of due process in this situation. Respondent contends that due process required that she receive notice and opportunity to be heard prior to the entry of the 30 April 1993 order suspending her law license. The North Carolina State Bar contends that both Article VI, § 5.i.(6), and due process permit the order to be entered ex parte and provide the respondent with a sufficient immediate post deprivation remedy. We agree with the State Bar and affirm the order of the trial court.

Due process of law formulates a flexible concept, to insure fundamental fairness in judicial or administrative proceedings which may adversely affect the protected rights of an individual. Baugh v. Woodard, 604 F. Supp. 1529 (E.D.N.C. 1985), affirmed in part, vacated in part, 808 F.2d 333 (4th Cir. 1987); State v. Tolley, 290 N.C. 349, 226 S.E.2d 353 (1976). Due process means simply a procedure which is fair and does not mandate a single, required set of procedures for all occasions; it is necessary to consider the specific factual context and the type of proceeding involved. Wilson v. Swing, 463 F.Supp. 555 (M.D.N.C. 1978); Poe v. Charlotte Memorial Hospital, Inc., 374 F.Supp. 1302 (W.D.N.C. 1974). In resolving any claimed violation of procedural due process, a balance must be struck between the respective interests of the individual and the gov-

ernmental entity seeking a remedy. Town of Hudson v. Martin-Kahill Ford, 54 N.C. App. 272, 283 S.E.2d 417 (1981), disc. review denied, 304 N.C. 733, 288 S.E.2d 804 (1982). "[E]ntitlement to a hearing does not automatically flow from a finding that procedural due process is applicable." Bowens v. Board of Law Examiners, 57 N.C. App. 78, 83, 291 S.E.2d 170, 173 (1982) quoting Tyler v. Vickery, 517 F.2d 1089 (5th Cir. 1975), cert. denied, 426 U.S. 940, 49 L.Ed.2d 393 (1976). (Due process afforded by opportunity for failing bar applicants to be reexamined.) At a minimum, due process requires adequate notice of the charges and a fair opportunity to meet them, and the particulars of notice and hearing must be tailored to the capacities and circumstances of those who are to be heard. Bowens v. N.C. Dept. of Human Resources, 710 F.2d 1015 (4th Cir. 1983).

Where a predeprivation hearing is impractical and a post-deprivation hearing is meaningful, a State satisfies its due process obligation by providing the latter. Giglio v. Dunn, 732 F.2d 1133 (2d Cir. 1984), cert. denied, 469 U.S. 932, 83 L.Ed.2d 265 (1984); See Waltz v. Herlihy, 682 F.Supp. 501 (S.D.Ala. 1988), affirmed, 871 F.2d 123 (11th Cir. 1989). (Denial of presuspension hearing pursuant to statutes authorizing suspension of license to practice medicine because of dispensing controlled substances other than for legitimate medical purpose and because of inability to practice medicine with reasonable skill and safety due to use of chemicals did not constitute denial of due process.) Where the State has an important interest to protect and probable cause to believe that plaintiff poses a real and imme-

diate danger to that interest, interim or temporary emergency deprivation of a property right pending a prompt judicial or administrative hearing is constitutional. Barry v. Barchi, supra; Gershenfeld v. Justices of the Supreme Court of Pa., 641 F.Supp. 1419 (E.D.Pa. 1986).

The United States Supreme Court has established a three-factor balancing test to resolve the due process issue in this context:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safe-guards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Matthews v. Eldridge, 424 U.S. 319, 335, 47 L.Ed.2d 18, 53 (1976). Thus, we must first weigh the private interest affected by the challenged action. In this case, the private interest affected is respondent's interest in continued possession and use of her law license pending the outcome of a postsuspension hearing. The State Bar agrees that this is a substantial interest, and we recognize that any hardship suffered during delay between erroneous deprivation and postsuspension restoration cannot be undone. See Henry v. Edmisten, supra. Factors bearing on the weight of respondent's interest in continuous use of her

law license include the maximum revocation period and the timeliness of postsuspension review. Id.

Under Article VI, § 5.i.(6), these factors operate conjunctively. Although the maximum revocation period is 180 days, the rule provides for an abbreviated period depending upon the actions of the suspended attorney. The rule provides for reinstatement of the license as soon as the suspended attorney demonstrates that he or she is no longer drinking alcohol or using mood-altering drugs in a length of the revocation period is ostensibly within the immediate control of the suspended attorney.

Similarly, the rule provides for prompt postsuspension review, which may occur at any time upon petition of the suspended attorney. In this case, although respondent waited over a month to file her motions, the motions were heard and ruled upon within six days of filing. The availability of prompt postsuspension review, along with a relatively brief suspension period, reduces the weight of the private interest in a suspended attorney's continued use of his or her law license pending the outcome of the postsuspension hearing. See Mackey v. Montrym, 443 U.S. 1, 61 L.Ed.2d 321 (1979); Henry, supra.

Second, the balancing test requires us to weigh the risk of erroneous deprivation of respondent's private interest as a result of the procedures used and the probably value of additional procedural safeguards. However:

> Due process does not mean that governmental deci sion making must comply with standards that assure error-free determinations... When... prompt post dep rivation review is available, what is generally required

> is no more than that the predeprivation procedures used be designed to provide a reasonably reliable ba sis for determining that the facts justifying the official action are as a responsible government official warrants them to be.

Henry, 315 N.C. at 484, 340 S.E.2d at 727-8. We believe that the predeprivation procedure set forth in Article VI, Section 5.i.(6) provides a reasonably reliable basis for determining that the facts justifying suspension are as alleged by the petitioning PALS members. The rule requires that at least two members of the PALS Committee have the opinion that a lawyer is drinking alcohol or using mood-altering drugs in sufficient amount to impair his ability to practice law. This opinion must be concurred in by **either** the Chairman or Director of PALS **and** the Executive Director of the North Carolina State Bar. Additionally, the rule requires that the affidavit of at least two persons attesting to such impairment must accompany the petition. The petition and affidavits are then reviewed by a superior court judge who makes the final determination as to whether the facts require suspension of the lawyer's license to practice law.

Finally, we must weigh the State's interest served by the summary suspension procedure. The proceeding prescribed by Article VI, Section 5.i.(6) promotes the State's compelling interest in preventing an impaired lawyer from engaging in conduct detrimental to the public, the courts, or the legal profession. See State Bar Rules, Article VI, Section 5.i.(4). The summary and automatic character of the suspension is

reasonably related to the purpose of the rule, i.e., to protect the public from lawyers whose ability to practice has been impaired by substance abuse. Presuspension hearings requiring notice and opportunity to be heard would encourage dilatory tactics on the part of impaired lawyers to try to maintain their privilege to license, frustrating the purpose of the rule and creating a further risk of damage to his or her clients and the proper administration of justice.

A recitation here of the evidence presented to Judge Kirby in the preset case would serve no useful purpose, although we must review it to insure that appellant's rights were not violated by the rule as it was applied to her. It is sufficient to say that the evidence was substantial and is strikingly illustrative of the need for providing the State Bar's PALS program with an ability to move quickly to carry out the purposes of the rule.

In Henry v. Edmisten, supra, our North Carolina Supreme Court expressed dissatisfaction with the use of the "balancing test" to determine what due process is required under the Law of the Land Clause of Article I, § 19 of the North Carolina Constitution. Id. at 490, 340 S.E.2d at 731. The Court promulgated the following principle as to the minimal requirements of due process required by the Law of the Land Clause:

> When the furtherance of a legitimate state interest re quires the state to engage in prompt remedial action adverse to an individual interest protected by law and the action proposed by the state is reasonably related to furthering the state interest, the law of the land ordi

> narily requires no more than that before such action is undertaken, a judicial officer determine there is probable cause to believe that the conditions which would justify the action exist.

Id. at 494, 340 S.E.2d at 733. As we have discussed, after it has been demonstrated that an attorney is drinking alcohol or using mood-altering drugs in sufficient amount to impair his or her ability to practice law, the State has a legitimate interest in prompt remedial action to prevent the present and future danger which such person poses to the proper operation of our legal system and those who rely upon it. The State Bar PALS procedure, as contained in the rule, provides for independent judicial review by a superior court judge, who must determine if the affidavits and petition establish a sufficient showing to justify a suspension. This procedure satisfies the requirements for sufficient process under the Law of the Land Clause of the North Carolina Constitution.

We note with approval that the Council of the North Carolina State Bar has, apparently as a result of the concerns raised by appellant in this case, proposed that Article VI, Section 5.i. of the State Bar Rules be revised to provide for presuspension notice and hearing except in emergency circumstances. See The North Carolina State Bar Newsletter, Vol. 19, No. 3, p.9. While we hold that the procedures prescribed by the current rule, and employed in this case, meet the minimal requirements of due process under our State and federal constitutions, we commend the State Bar for providing increased

safeguards for the rights of attorneys while continuing its efforts to protect the public from, and provide assistance to, practitioners impaired by alcoholism or other substance addictive illness.

In summary, the application of Article VI, Section 5.i(6) of the Rules of the North Carolina State Bar to the facts before us does not violate respondent's rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution or the Law of the Land Clause of Article I, § 19 of the North Carolina State Constitution.

Affirmed.

Judge COZORT concurs.

Judge ORR concurs in part, and dissents in part.

Judge ORR concurring in part and dissenting in part.

While I do not disagree with the analysis employed by the majority as it applies to the issues dealing with pre-deprivation hearings and a meaningful post-deprivation hearing, I find the Rule at issue in this case constitutionally infirm in one respect. Although there is a post-deprivation process by which an attorney can have his or her license reinstated, there is no provision or procedure to determine if the initial unilateral action of suspension was in fact appropriate. A post-deprivation hearing that merely reinstates a suspended license, upon a finding that at the time of the hearing the attorney involved is not impaired, provides no meaningful opportunity to contest the results of the original process and the resulting sus-

pension. There should at a minimum be an opportunity for the affected party to challenge the initial action and the resulting suspension. For this reason, I concur in part and dissent in part.

No. 539A94 TWENTY-SEVENTH A DISTRICT

SUPREME COURT OF NORTH CAROLINA

****

IN RE: ANNE M. LAMM)
From Gaston

****

NOTICE OF APPEAL
and
PETITION FOR DISCRETIONARY REVIEW
AS TO ADDITIONAL ISSUES
(Filed 25 October 1994)
(Allowed 9 February 1995)
and
MOTION TO DISMISS
(Filed 2 November 1994)
(Denied 9 February 1995)

****

TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:

Anne M. Lamm, Respondent-Appellant-Petitioner ("Appellant"), hereby appeals to the Supreme Court of North Carolina from the Judgment of the Court of Appeals of North Carolina, entered September 20, 1994 (copy attached).

This Judgment affirmed a decision of the Superior Court of Gaston County which had, on Petition of the Positive Action for Lawyers Committee of the North Carolina State Bar, ex parte found as a fact and concluded as a matter of law that Appellant was "drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law" (R p 10) and suspended her license to practice law. Id. On later Motion of Appellant (R p 12) the Superior Court refused to set this Order aside and refused to allow Appellant to file Answer and be heard on the merits of the Petition against her. (R p 19). On appeal the North Carolina Court of Appeals affirmed. Judge Robert F. Orr dissented based on the following issue:

> Question No. 1: Whether, in a proceeding pursuant to Article VI, § 5i(6) of the Rules, Regulations and Orga nization of the North Carolina State Bar, wherein the Superior Court ex parte upon the petition of the Posi tive Action for Lawyers Committee of the North Caro lina State Bar found as a fact and concluded as a matter of law that Appellant was drinking alcohol and using mood-altering drugs in sufficient quantities to impair her ability to practice law and thereupon suspended

Appellant's license to practice law, the Superior Court erred and deprived Appellant of due process of law under Article I, § 19 of the Constitution of North Caro lina and the Fourteenth Amendment to the United States Constitution by denying Appellant's motion that its Order be set aside and she be allowed to file An swer and otherwise contest this matter on the merits, thereby depriving her of all opportunity to challenge her suspension from law practice.

Further, Appellant hereby appeals to the Supreme Court of North Carolina from this said Judgment of the Court of Appeals of North Carolina, which Judgment directly involves substantial questions arising under the Constitutions of the United States and the State of North Carolina, as follows:

Question No. 2: Whether (a) the Court of Appeals erred by deciding a constitutional issue that was not pre sented, namely be deciding whether a hearing after the fact of deprivation of Appellant's right to practice law was sufficient process when the hearing that was in fact held was not a post-deprivation hearing but was a hearing on reinstatement of Appellant's license; and (b) alternatively, whether the Court of Appeals erred in de termining that Article I, § 19 of the Constitution of North Carolina and the Fourteenth Amendment to the United States Constitution did not require that Appellant be given notice and an opportunity to be heard before the

Superior Court determined that she was unfit to practice law and suspended her license.

Question No. 3: Whether the Court of Appeals violated the Supremacy Clause of the United States Constitution, Article VI, cl. 2, by failing to apply In Re Ruffalo, 390 U.S. 544, 20 L.Ed.2d 117 (1968), in which the United States Supreme Court held that the due process clause of the Fourteenth Amendment requires notice and an opportunity to be heard before an attorney may be disbarred.

Question No. 4: Whether the Court of Appeals failed to follow the decision of this Court in In Re Burton, 257 N.C. 534, 544 (1962), which held that due process of law requires that a proceeding by a Court to investigate alleged misconduct of an attorney must be initiated by a rule or order to show cause granting a reasonable time for answer and preparation of defense and then allowing full opportunity to be heard before judgment is rendered.

In the event that the Court finds these constitutional issues to be substantial, they are the issues which Appellant intends to present for review in her Brief, together with Question No. 1. These questions were each raised in the Superior Court by the Rule 60(b)(4) Motion and Motion to Set Aside Order (R p 12), which specifically claimed that the suspension of Appellant's license without prior opportunity to be heard violated both the State and Federal Constitutions, and by appropriate exceptions and assignments of error in the Record of Appeal.

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STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON.
File No._____

IN RE ANNE M. LAMM,	)	ORDER
	)	
Respondent.	)	
(Filed Under Seal)_____	)	

This matter is before the Court on the Rule 60(b)(4) Motion and Motion to Set Aside Order ("the Motion"), filed June 11, 1993.

1. This is an action brought pursuant to Article VI, § 5i(6) of the Rules of the North Carolina State Bar ("the Rule"). This action was commenced on April 30, 1993, by the filing of a Verified Petition praying that Respondent's license to practice law be temporarily suspended pursuant to the Rule, and for other relief. The matter was heard ex parte that same day by the undersigned Judge Presiding, without notice to Respondent or any opportunity for her to be heard, as provided by Article VI, § 5i(6) of the Rules of the North Carolina State Bar. The Court, based upon the Petition and the Affidavits of Rachel Pickard and Betty B. Jenkins, Clerk of Superior Court of Gaston County, entered its Order of record, providing that

Respondent's license to practice law in the State of North Carolina was suspended for 180 days from the date of the Order, or until such earlier date as this Court should find that Respondent was no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law. A copy of this Order, of the Petition, and of the Affidavits was served on Respondent on or about May 3, 1993, by personal delivery to her from Petitioner Robert L. Bradley. The Respondent's Motion was filed on June 11, 1993, and heard that same day. Petitioners were represented at the hearing by Carolin Bakewell, Counsel for the North Carolina State Bar. Respondent was represented at the hearing by George Daly of the Charlotte, North Carolina Bar. Respondent and Attorney Edward Murrelle, Director of the North Carolina State Bar Positive Action for Lawyers Committee ("PALS Committee") were present at the hearing. Respondent's counsel had advised the State Bar on Monday, June 7, 1993, of Respondent's intention to file the Motion, and counsel and the Court conferred in a telephone conference call on the next day to schedule the hearing. The Motion was provided to the Court and counsel by facsimile transmission on Thursday, June 10, 1993. Petitioners have waived any further notice of motion to which they might be entitled.

2. At the hearing Respondent first brought on her Motion. After hearing the parties in argument, the Court denied the Motion. Respondent excepted.

3. The Court then considered whether, pursuant to the Rule, Respondent was "no longer drinking alcohol or us-

ing mood-altering drugs in sufficient amounts to impair his or her ability to practice law." In its consideration of this matter, the Court received testimony as follows:

(a) Respondent testified:

(i) that she had been a licensed attorney since 1969;

(ii) that she had no notice or opportunity to be heard before the Order herein was entered;

(iii) that she was presently an alcoholic;

(iv) that she was not presently addicted to mind-altering drugs, and has never been so;

(v) that she had not imbibed alcoholic beverages since April 25, 1993;

(vi) that she was taking, pursuant to prescription from a medical doctor, the drug sinequan, which was "mind-altering" in that it tends to suppress her mood swings;

(vii) that on May 23, 1993, she had voluntarily presented herself to The Life Center of Galax, Virginia, an alcoholic rehabilitation center, and had successfully competed its two-week program;

(viii) that she was currently attending the Dilworth Center for Chemical Dependency, in Charlotte, North Carolina and attending Alcoholics Anonymous meetings on a regular basis as advised by the Dilworth Center;

(ix) that since April 25, 1993, her memory, her presence of mind, and her ability to get along with people had substantially improved; and

(x) that in her opinion, from and after April 25, 1993, she was competent and capable of practicing law.

(b) The State Bar presented the testimony contained in the Affidavits of Rachel Pickard and Betty B. Jenkins, to which Respondent waived any objection as to hearsay or other objections, except that Respondent presented testimony (pertaining to Paragraph 2 of the Jenkins Affidavit) that Mr. Fletcher had not made the statement regarding Respondent's condition which is attributed to him in that Paragraph.

(c) Edward Murrelle testified for the State Bar:

(i) that he is a licensed North Carolina attorney in good standing and has been licensed to practice in this state since 1964;

(ii) that he has been the Director of the PALS Committee since 1988;

(iii) that he has attended four week-long workshops sponsored by the American Bar Association Impaired Lawyer Commission since 1988;

(iv) that he has been a trustee of the Blue Ridge Alcoholics Anonymous Retreat since 1986;

(v) that he represents Fellowship Hall, a treatment center for individuals suffering from substance abuse and addiction;

(vi) that he has worked with approximately 85 individuals suffering from alcoholism since becoming involved with the PALS Committee program;

(vii) that based upon his training and experience, it is his opinion that alcoholism is a chronic, progressive disease in which relapse is prevalent unless an ongoing treatment program is utilized;

(viii) that based upon his training and experience, attending an in-house treatment program is only the first step in recovering from alcoholism and that it is crucial that the patient continue follow up treatment, such as regularly attending Alcoholics Anonymous;

(ix) that before the PALS Committee sought an order suspending Lamm's license to practice law in April 1993, numerous attempts were made by PALS Committee volunteers over a period of approximately two years to persuade her to seek treatment for her alcoholism; and

(x) that the PALS Committee sought the order suspending Lamm's license to practice law only after Lamm rejected attempts by PALS Committee representatives to persuade her to seek treatment for her alcoholism and it appeared that her condition was worsening.

(d) Respondent testified on crossexamination:

(i) that she was charged with a third offense of driving while impaired on or about April 25, 1993; and

(ii) that she was voluntarily entered the detoxification unit of Mercy Hospital in Charlotte, North Carolina for treatment of alcoholism from April 26 to April 30, 1993.

The Court is informed that Lamm and the PALS Committee have entered into a contract for treatment.

Based upon the foregoing testimony, the Court finds as a fact that Respondent is no longer drinking alcohol or using mood-altering drugs in sufficient amounts to impair her ability to practice law.

The Court thereupon concludes as a matter of law that:

1. Respondent's Motion should be denied; and

2. Respondent having entered a Contract for treatment, Respondent's license to practice law should be reinstated.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that the license of Respondent Anne M. Lamm to practice law in the State of North Carolina shall be, and the same hereby is, **REINSTATED.**

The parties have consented that this Order may be entered out of County and out of term.

This 17 day of June, 1993.

/s/ Hon. Robert W. Kirby
Robert W. Kirby
Senior Resident Superior Court Judge for Gaston County

STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON.
File No._____

IN RE ANNE M. LAMM,	)	RULE 60(b)(4) MOTION
	)	and
Respondent.	)	MOTION TO SET ASIDE
	)	ORDER
_____	)	

(Filed Under Seal)

NOW COMES ANNE M. LAMM and respectfully shows:

1. On April 30, 1993, the attached Petition was filed. Upon information and belief no summons issued.

2. On April 30, 1993 the attached Order was entered.

3. On May 3 or May 4, 1993, Respondent received a copy of the Petition and Order and Affidavits by personal delivery from Robert Bradley. Previously she had no knowledge of either document. She has never been served with process in this action.

4. Prior to the institution of this action Respondent was a licensed North Carolina attorney in good standing.

5. Article VI, § 5i(6) of the Rules of the North Carolina State Bar, pursuant to which this proceeding is brought, is vague and overbroad and substantively arbitrary, in violation of Article I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

6. The course of proceeding herein and Article VI, § 5i(6) of the Rules of the North Carolina State Bar have, by their failure to give Respondent notice or an opportunity to be heard before being deprived of her liberty and property, violated the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

WHEREFORE, Respondent respectfully moves, pursuant to N.C.R.Civ.P. 60(b)(4) and the inherent power of the Court:

1. that this proceeding be declared void, and be expunged; and

2. that, alternatively, the Order herein be set aside, and Respondent be allowed to Answer (in the form attached), and be appropriately heard before any action be taken against her.

Respectfully submitted, this 11 day of June, 1993.

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Attorney for Petitioner

STATE OF NORTH CAROLINA,
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
COUNTY OF GASTON. File No._____

IN RE ANNE M. LAMM,	)	
	)	
Respondent.	)	ANSWER TO PETITION
	)	
	)	
_____	)	

NOW COMES Respondent and, answering the Petition herein, respectfully says:

FIRST DEFENSE

Answering the numbered allegations of the Petition:

1. Admitted.
2. Denied.
3. Admitted.
4. It is not denied that the named persons have the opinion that they profess, but it is denied that Respondent is drinking alcohol or using mood altering drugs in any amount (except that Respondent is taking medically prescribed medications in the prescribed dosages) and it is denied that her ability to practice law is impaired.

5. Denied.

6. Denied.

SECOND DEFENSE

By failing to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, this proceeding has violated the Fourteenth Amendment to the United States Constitution.

THIRD DEFENSE

By failing to give Petitioner notice or an opportunity to be heard before being deprived of her liberty and property, this proceeding has violated Article I, § 19 of the North Carolina Constitution.

FOURTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(1) for lack of jurisdiction over the subject matter.

FIFTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(2) for lack of jurisdiction over the person.

SIXTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(4) for insufficiency of process.

SEVENTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(5) for insufficiency of service of process.

EIGHTH DEFENSE

This action should be dismissed pursuant to N.C.R.Civ.P. 12(b)(6) for failure to state a claim upon which relief can be granted.

NINTH DEFENSE

Article VI, Section 5i(6) of the Rules of the North Carolina State Bar is unconstitutionally vague and overbroad in its provision that Respondent's license to practice law may be suspended or inactivated for "impair[ment]" of her ability to practice law, in violation of the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

TENTH DEFENSE

Article VI, Section 5i(6) of the Rules of the North Carolina State Bar is substantively arbitrary in its provision that Respondent's license to practice law may be suspended or inactivated for "impair[ment]" of her ability to practice law, in violation of the Fourteenth Amendment to the Constitution of the United States and Article I, § 19 of the North Carolina Constitution.

ELEVENTH DEFENSE

Article VI, § 5i(6) of the Rules of the North Carolina State Bar is substantively arbitrary in not requiring that Respondent's ability to practice law be actually impaired before her license to practice law may be suspended or inactivated.

WHEREFORE, Petitioner respectfully prays that this proceeding be declared void, and be expunged, and that she recover her costs and have such other and further relief as is merited in the premises.

Respectfully submitted, this 11 day of June, 1993.

George Daly
GEORGE DALY, P.A.
101 North McDowell Street, Suite 226
Charlotte, North Carolina 28204
N.C. Bar License No. 1071
Telephone: (704) 333-5196
FAX: (704) 333-4465

Attorney for Petitioner

.0606 Suspension for Impairment, Reinstatement

If it appears that an attorney's ability to practice law has been impaired by drug or alcohol use, the committee may petition any superior court judge to issue an order in the court's inherent authority suspending the attorney's license to practice law in this state for up to 180 days.

(a) The petition shall be supported by affidavits of at least two persons setting out the evidence of the attorney's impairment.

(b) The petition shall be signed by the executive director of the committee and the executive director of the North Carolina State Bar.

(c) The petition shall contain a request for a protective order sealing the petition and all proceedings respecting it.

(d) Except as set out in Rule .0606(j) below, the petition shall request the court to issue an order requiring the attorney to appear within 10 days and show cause why the attorney should not be suspended from the practice of law. No order suspending an attorney's license shall be entered without notice and a hearing, except as provided in Rule .0606(j) below.

(e) The order to show cause shall be served upon the attorney, along with the State Bar's petition and supporting affidavits, as provided in Rule 4 of the North Carolina Rules of Civil Procedure.

(f) At the show cause hearing, the State Bar will have the burden of proving by clear, cogent and convincing evidence that the attorney's ability to practice law has been impaired by drug or alcohol use.

(g) If the court finds that the attorney is impaired, the court may enter an order suspending the attorney from the practice of law for up to 180 days. The order shall specifically set forth the reasons for its issuance.

(h) At any time following entry of an order suspending an attorney, the attorney may petition the court for an order reinstating the attorney to the practice of law.

(i) A hearing on the reinstatement petition will be held no later than 10 days from filing of the petition, unless the suspended attorney agrees to a continuance. At the hearing, the suspended attorney will have the burden of establishing by clear, cogent, and convincing evidence that his or her ability to practice law is not impaired by drug or alcohol use and, if impairment has previously existed, that the threat of impairment from drug or alcohol use has been and is being

treated and/or managed to minimize the danger to the public from a reoccurrence of drug or alcohol impairment.

(j) No suspension of an attorney's license shall be allowed without notice and a hearing unless:

(1) the State Bar files a petition with supporting affidavits, as provided in Rule .0606(a)-(c) above.

(2) the State Bar's petition and supporting affidavits demonstrate by clear, cogent, and convincing evidence that immediate and irreparable harm, injury, loss, or damage will result to the public, to the lawyer who is the subject of the petition, or to the administration of justice before notice can be given and a hearing had on the petition.

(3) the State Bar's petition specifically seeks the temporary emergency relief of suspending ex parte the attorney's license for up to 10 days or until notice be given and a hearing held, whichever is shorter, and the State Bar's petition requests the court to endorse an emergency order hereunder with the hour and date of its entry.

(4) the State Bar's petition requests that the emergency suspension order expire by its own terms 10 days from the date of entry, unless, prior to the expiration of the initial 10-day period, the court agrees to extend the order for an additional 10-day period for good cause shown or the respondent attorney agrees to an extension of the suspension period.

(k) The respondent attorney may apply to the court at any time for an order dissolving the emergency suspension order. The court may dissolve the emergency suspension order without notice to the State Bar or hearing, or may order a hearing on such notice as the court deems proper.

Supreme Court, U.S.
FILED
NOV 27 1995
CLERK

(2)

No. 95-694

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

IN RE: ANNE M. LAMM,
Petitioner

On Petition for a Writ of Certiorari to the North Carolina Supreme Court

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the temporary, emergency suspension of Petitioner's license to practice law based upon an *ex parte* finding that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law deprived Petitioner of property without due process of law in violation of the Fourteenth Amendment to the United States when Petitioner was afforded a prompt, post-suspension hearing at which her license was restored?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-694

IN RE: ANNE M. LAMM,
Petitioner

On Petition for a Writ of Certiorari to the North Carolina Supreme Court

---

RESPONDENT'S BRIEF IN OPPOSITION

Respondent hereby respectfully requests the Court to deny the Petition for a Writ of Certiorari submitted by the Petitioner, Anne M. Lamm.

STATEMENT OF THE CASE

On April 30, 1993, the Positive Action for Lawyers (PALs) Committee of the North Carolina State Bar [1] filed a verified petition in Gaston County Superior Court, requesting entry of a temporary order suspending the law license of Anne M. Lamm (hereafter, Petitioner), on the ground that Petitioner was using alcohol and mood altering drugs in sufficient amounts to impair her ability to

[1] The North Carolina State Bar is the state agency empowered by statute to govern attorneys in North Carolina. The PALS Committee is a standing committee of the North Carolina State Bar which was created in 1979 by order of the North Carolina Supreme Court to assist chemically dependent lawyers. *See* 302 N.C. 637 (1979). The PALS Committee has a full time Executive Director and a staff assistant who are paid by the N.C. State Bar but is otherwise operated by volunteer attorneys across the state.

practice law. As required by State Bar rule, the petition was filed under seal. Copies of the petition and the two affidavits submitted with it are attached as Appendices A-C.

Later on April 30, 1993, Hon. Robert W. Kirby, then the resident superior court judge of the 27A judicial district, heard the PALS Committee petition *ex parte* and entered an order temporarily suspending Petitioner's law license. Judge Kirby's order (hereafter, April 30 order) provided that Petitioner's license would be restored upon a showing that Petitioner was no longer impaired or after 180 days had elapsed, whichever first occurred. Judge Kirby also ordered that the record remain under seal. Petitioner was served with a copy of the order on May 3, 1993. A copy of the April 30 order is attached as Appendix D.

On June 11, 1993, Petitioner filed a motion to vacate the April 30 order and expunge the court's records. In the alternative, Petitioner asked the court to set aside the April 30 order and grant her a hearing. Following an in-chambers hearing on June 17, 1993, Judge Kirby entered an order finding that Petitioner was no longer impaired and reinstated Petitioner's law license. Judge Kirby denied Petitioner's motion to vacate the April 30 order and expunge the court's records.

REASONS FOR DENYING THE WRIT

Petitioner contends that the question before this Court is whether she was deprived of a constitutionally protected property interest when her license was "revoked" based upon "an ex parte finding that she was using alcohol and mood altering drugs in sufficient amounts to impair her ability to practice law . . . without allowing her any opportunity to challenge this finding . . ." Petitioner's Brief at p. i. Petitioner's formulation of the issue thus creates the impression that she was permanently deprived of a property interest without any hearing whatever.

In fact, Petitioner's law license was temporarily suspended, not revoked, pursuant to an emergency *ex parte* order issued by the Gaston County Superior Court on April 30, 1993, after members of the N.C. State Bar PALS Committee presented evidence demonstrating that Petitioner was abusing alcohol and drugs such that her ability to practice law was impaired. On June 17, 1993, six days after Petitioner's petition was filed, an in-chambers hearing was held and Petitioner's license was reinstated by Judge Kirby.

It is clear, therefore, that Petitioner's license was not "revoked" without a hearing. Rather, her license was temporarily suspended on an emergency *ex parte* basis. Petitioner was granted a prompt post-deprivation hearing and was reinstated to the practice of law at the conclusion of the hearing. Consequently, this Court is not presented with a case in which a licensee has been permanently deprived of a property interest without any hearing.

Close review of Petitioner's brief suggests that her real complaint is that Judge Kirby did not permit Petitioner to challenge the court's findings that she was impaired as of April 30, 1993. As discussed, *supra*, the June 17 hearing focused on whether Petitioner's license should be reinstated, not whether it had been properly suspended in the first place. Petitioner takes the position that her reputation is a constitutionally protected property interest and that due process required the trial court to permit her to attack the April 30 order for the purpose of clearing her name even after her law license was restored on June 17.

Regardless of the merits or demerits of Petitioner's contention, the question of whether Petitioner had a constitutional right to attack the April 30 order is not properly before this Court, as it was not the subject of an assignment of error to the N.C. Court of Appeals. In her assignments of error, Petitioner preserved only two issues for appellate review: 1) whether Rule 5i(6) is vague and

overbroad[2] and 2) whether Petitioner was deprived of notice and an opportunity to be heard before being deprived of her liberty and property, in violation of the Fourteenth Amendment of the U.S. Constitution. *See* Appendix E. Nowhere does Appellant assign error to the fact that she was not permitted at the June 17 post-suspension hearing to challenge the finding that she was impaired as of April 30, 1993.

Even if this issue is properly before the Court, however, there is no support for Petitioner's argument that she had a constitutional right to attack the finding that she was impaired as of April 30 even after her license was reinstated. Appellant's contention turns on the premise that her reputation was damaged by the finding that she was impaired as of April 30 and that she therefore had a right to challenge that finding to clear her name. It is well established, however, that reputation is not a liberty or property interest "by itself sufficient to invoke the procedural protection of the Due Process Clause." *Paul v. Davis*, 424 U.S. 693, 701, 96 S.Ct. 1155, 1161, 47 L.Ed. 2d 405, 414 (1976), *reh. denied*, 425 U.S. 985. Petitioner has failed to cite a single case which holds that a licensee has a constitutional right to challenge the validity of the original emergency suspension of his or her license once the state has restored the license in a prompt post-suspension hearing. Consequently, Petitioner was not deprived of any protected property right by reason of the court's refusal on June 17 to permit her to attack the finding that she was impaired as of April 30.[3]

Although not mentioned in Petitioner's formulation of the issue before this Court, Petitioner contends in her

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[2] Petitioner did not brief this issue on appeal and it was therefore deemed abandoned pursuant to Rule 28 of the N.C. Rules of Appellate Procedure.

[3] The potential significance of Petitioner's case is also diminished by the fact that N.C. State Bar Rule 5i(6) was substantially amended in 1994. Consequently, it is unlikely that the exact circumstances at issue in Petitioner's case will ever recur.

brief that "[f]undamental fairness required that [Petitioner] have an opportunity to present her case before her license was suspended." Petitioner's brief at 8. Petitioner thus also appears to contend that her constitutional rights were violated because the initial emergency suspension order was issued *ex parte*. Petitioner's argument in this regard does not raise any constitutional issues worthy of consideration by this Court, however.

The parties agree that Petitioner's license to practice law constitutes a property interest entitled to constitutional protection. *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-239, 77 S.Ct. 752, 756, 1 L.Ed.2d 796, 801 (1957). It is also clear that Petitioner's law license was temporarily suspended *ex parte* and that she was granted a prompt, post-deprivation hearing on June 17, 1993. Petitioner's suggestion that her due process rights were violated because there was no hearing prior to the issuance of the emergency suspension order is not an accurate statement of the law. Due process does not invariably require a hearing prior to deprivation of a property interest. "Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484, 494 (1972). Determining the dictates of due process in a given case requires a balancing of the private interest at stake against the risk of an erroneous deprivation by the government and the magnitude of the government's interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 903, 47 L.Ed.2d 18, 33 (1976).

Where the state has probable cause to believe that the licensee poses an immediate threat to the public, the decisions of this Court clearly hold that the state may temporarily suspend the licensee, provided that there is an opportunity for a prompt post-suspension hearing. *See, e.g., Mackey v. Montrym*, 443 U.S. 1, 19, 99 S.Ct. 2612, 2621, 61 L.Ed.2d 321, 335 (1979); *Barry v. Barchi*, 443 U.S. 55, 99 S.Ct. 2642, 61 L.Ed.2d 365 (1979).

In the instant case, Petitioner concedes that she is an alcoholic. Petitioner's R. 22. For the period of approximately 12 months before the April 30 order was entered, PALS Committee members received reports from various individuals, indicating that Petitioner had appeared at the courthouse during working hours while intoxicated and that she was not completing work for clients on a timely basis. App. B, C. PALS members also received evidence that Petitioner was not cooperating with the clerks of court and that she had stopped attending Alcoholics Anonymous meetings. *Id.* Despite her condition, Petitioner refused assistance from PALS volunteers. App. B.

By early April 1993, the situation had become increasingly serious. A lawyer who shared space with Petitioner reported that Petitioner had not appeared regularly at work for months and that she had appeared at the courthouse, on crutches, while intoxicated. App. B. Later, on April 23, 1993, Petitioner appeared in her office, smelling of alcohol. *Id.* She fell and cut herself so badly over one eye that she had to be transported by ambulance to a local hospital. *Id.* On April 27, just three days before seeking the suspension order, PALS volunteers learned that Petitioner had been arrested for driving while impaired and that she was at that time a patient in the Mercy Hospital detoxification unit. *Id.* The arrest was Petitioner's third charge of driving while impaired. Petitioner's App. 24.

In Petitioner's case, the evidence establishes that Petitioner is an alcoholic and that she had resumed abusing alcohol well before April 1993. Members of the PALS Committee had attempted to persuade Petitioner to seek treatment for more than a year prior to April 1993. It was only when their efforts were rejected and it appeared that Petitioner's situation was rapidly becoming worse that the PALS Committee filed the petition requesting a temporary suspension of Petitioner's law license. The State Bar and the PALS Committee thus had probable cause to believe that Petitioner was impaired and to seek an

emergency temporary suspension of Petitioner's law license.

Moreover, N.C. State Bar Rule 5i(6) provided an opportunity for a prompt, post-suspension hearing. Like the Massachusetts statute at issue in *Mackey v. Montrym, supra,* State Bar Rule 5i(6) permitted Petitioner to seek reinstatement at any time following entry of the order. Thus, while Petitioner did not seek reinstatement until June 11, 1993, she could have done so at any time after entry of the April 30 order. N.C. State Bar Rule 5i(6) thus provides for a very prompt post-suspension hearing and is consistent with the demands of due process.

Petitioner's interest in retaining her law license was outweighed by the N.C. State Bar's interest in protecting the public from an impaired lawyer. The risk of an erroneous suspension was slight and N.C. State Bar Rule 5i(6) provided an opportunity for an immediate post-suspension hearing. The N.C. State Bar had probable cause to believe that the Petitioner was impaired by reason of her drug and alcohol abuse and that she therefore posed a threat to the public, justifying entry of the *ex parte* suspension order. Under the circumstances, the N.C. State Bar was not obliged to provide a hearing prior to the entry of the April 30 order and Petitioner's due process rights were not violated. That being the case, there are no significant constitutional issues justifying the issuance of the writ of certiorari by this Court.

CONCLUSION

The Petitioner has failed to demonstrate that this case involves any significant constitutional issues. The Writ of Certiorari should therefore be denied.

Respectfully submitted,

A. ROOT EDMONSON
(Counsel of Record)
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Nov. 27, 1995

APPENDICES

APPENDIX A

**[Filed Under Seal
CSC Gaston Co., N.C.
April 30, 1993]**

NORTH CAROLINA
GASTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

File No. ———

IN RE: ANNE M. LAMM,
Respondent.

PETITION

The undersigned petitioners, Rachel Pickard and Robert L. Bradley, allege, as follows:

1. That petitioners are citizens and residents of Gaston County, North Carolina; are active members of the North Carolina State Bar (hereinafter referred to as "Bar"), and petitioners are members of the Positive Action for Lawyers Committee (hereinafter referred to as "the PALS Committee") of the North Carolina State Bar.

2. That this petition is filed pursuant to N. C. Gen. Stat. § 84-21, N. C. Gen. Stat. § 84-28(g) and Article VI, Section 5 i(6), Standing Committees of the Council of the North Carolina State Bar.

3. That the respondent Anne M. Lamm is a citizen and resident of Gaston County, North Carolina, is a mem-

ber of the Bar and is subject to the disciplinary authority granted to the Bar pursuant to the laws of the State of North Carolina and is subject to the disciplinary authority granted to this Court.

4. That the respondent is drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law in the opinion of the petitioners, the director of PALS and the Executive Director of the Bar.

5. That pursuant to N. C. Gen. Stat. § 84-28(g) and Article VI, Section 5, Standing Committees of the Council of the Bar, this Court has the authority to suspend the license of Anne M. Lamm for a period of 180 days or until such time as said respondent can show unto this Court that she has the mental and physical capacity to practice law, whichever shall first occur.

6. That said suspension should be for a period not to exceed 180 days, or until such time as respondent can show the Court that she has the mental and physical capacity to practice law, whichever shall first occur.

WHEREFORE, the undersigned petitioners pray the Court for an order, as follows:

1. That respondent's license to practice law in the State of North Carolina be temporarily suspended for a period of 180 days from the date of the order or until such earlier date as the respondent upon petition and upon a satisfactory showing proves to the Court that the respondent is no longer using alcohol and/or other mood altering drugs;

2. That respondent be directed to meet with a designee of the PALS Committee to consider appropriate measures to facilitate respondent's recovery;

3. That the Clerk of this Court be directed to place this file under seal and maintain the confidentiality of this file until further orders by this Court;

4. That the Court retain jurisdiction of this matter; and

5. That the Court enter such other orders as may seem just and proper.

This the 29th day of April, 1993.

/s/ Rachel Pickard
RACHEL PICKARD
Attorney at Law

/s/ Robert L. Bradley
ROBERT L. BRADLEY
Attorney at Law

NORTH CAROLINA
GASTON COUNTY

VERIFICATION

Rachel Pickard, being first duly sworn, deposes and says:

She is a petitioner in the above-entitled action; that she has read the foregoing Petition and knows the contents thereof; that the same is true of her own knowledge, except as to those matters and things therein stated upon information and belief, and that as to those maters and things, she believes it to be true.

/s/ Rachel Pickard
RACHEL PICKARD

[Notary Omitted in Printing]

APPENDIX B

**[Filed Under Seal
CSC Gaston Co., N.C.
April 30, 1993]**

NORTH CAROLINA
GASTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

File No. ———

IN RE: ANNE M. LAMM,
Respondent

AFFIDAVIT

I, Rachel Pickard, being first duly sworn, depose and say as follows:

1. That I am a member of the North Carolina State Bar, the Gaston County Bar and a member of the Positive Action for Lawyers Committee (hereinafter referred to as PALS).

2. That at present there are only two active members of the PALS Committee in Gaston County, namely: myself and Robert L. Bradley.

3. That on April 9, 1992 I received a call from Ernie Machen of the PALS Committee, and he informed me that there had been a call into the Pals Office. This call had originated, I subsequently learned, from an attorney who had been present in the Clerk of Superior Court's office and had observed that Anne M. Lamm had ap-

peared to be intoxicated in the Clerk's office and also acted in an inappropriately argumentative manner with the Assistant Clerks present there.

4. Approximately 1 1/2 years prior to this the PALS Committee had had an inquiry on Ms. Lamm, but at that time I informed Edward Murrelle, Director of PALS, that to the best of my knowledge, and that of Mr. Bradley, Ms. Lamm was not drinking or otherwise chemically dependent, and was sporadically attending, if not involved in, the program of Alcoholics Anonymous (hereinafter AA). It is my understanding that the PALS Committee did not take any action following this first report.

5. However, at the time of the April 9, 1992 call from Mr. Machen, I was of the opinion that Ms. Lamm was not attending local AA meetings on a regular basis.

6. At the time Mr. Bradley was not available to meet with Ms. Lamm, and therefore, I asked Joe Roberts, a local attorney whom I personally know to have been involved with AA many years, to go and talk with Ms. Lamm.

7. On May 12, 1992, Mr. Bradley called me to say that he had observed Ms. Lamm in court the day before and that she appeared to be unsteady on her feet. Also, I talked to attorney Tom Will who said he had observed her at the courthouse, and that she appeared to be impaired and was unsteady on her feet. I confirmed with Betty Jenkins, Clerk of Superior Court of Gaston County, North Carolina, that Ms. Lamm had been in her office, had smelled of alcohol, had been extremely argumentative, and further, was not co-operative in doing the estate work for her clients in a timely manner, and would not turn over documents requested by the Clerks. She told me that in one case Ms. Lamm's client had to send the Sheriff to her office to retrieve the client's papers. I also heard that Ms. Lamm had been observed by an attorney falling in the parking lot behind her office building.

8. At this time it was often extremely difficult to contact Ms. Lamm at her office because for months she would leave her answering machine on, but said machine was broken and would not take a message. Contacting Ms. Lamm has remained a problem for virtually all of the attorneys in Gaston County, the Court, the Clerk and myself for the above reason, and continues to be a problem because she usually does not answer the telephone and will often not return telephone calls.

9. Joe Roberts and I did meet with Ms. Lamm in her office in May, 1992. She agreed to start attending AA meetings again. We ascertained that she was an alcoholic and was presently taking prescription drugs.

10. I understood from Joe Roberts that Anne Lamm did attend one AA meeting after our conference.

11. In June, 1992 I had been approached by a former client of Anne Lamm's who told me Ms. Lamm had refused to make an accounting of monies she had relating to this client's father's estate, and that when the client inquired as to certain matters, Ms. Lamm screamed at the client in an irrational manner. I talked to this lady, and in a day or two, referred the case to Tom Kakassy, deciding it was inappropriate for me to take the case. Mr. Kakassy had many difficulties communicating with Ms. Lamm thereafter.

12. Mr. Roberts did talk to Ms. Lamm personally about her failure to attend the AA meetings she had promised, and she had no satisfactory reply.

13. Mr. Roberts and I again met with Ms. Lamm in the Fall of 1992 and she basically told us that she did not want any assistance from us as individuals, as AA members or as members of the Pals Committee. I subsequently informed Eddie Murrelle of this conversation, and we agreed that the PALS program would close this case as Ms. Lamm did not want nor would accept any help.

14. In January, 1993 Ms. Jenkins stopped me and told me that Ms. Lamm had been in her office and again smelled of alcohol, and that she was not doing her estate work in a timely manner. About this time Curtis Harris, a member of the Gaston Bar active in AA, said he had seen Ms. Lamm in District Court and on that occasion her speech had been incoherent.

15. In approximately February, 1993 I asked Eddie Murrelle if I could try and talk with Ms. Lamm one more time, as clerks and lawyers were by now stopping me in the halls and asking what could be done about her situation. Curtis Harris told me he was willing to go talk with her as he considered her a friend and had represented her at her probationary driver's license hearing some two or three years previously. Mr. Murrelle obtained permission from the lawyer who represented Ms. Lamm before the State Bar Grievance Committee to contact her regarding assistance offered by PALS.

16. Again we had a great deal of difficulty reaching Ms. Lamm at her office. Then, I learned from Attorney Robert Lawing, who shares office space with her, that she had broken her leg, and had been at the Courthouse in an inebriated state while on crutches. He authorized me to use his name in talking with her, and informed me that she was not and had not been for many months appearing at her office on a regular basis.

17. Mr. Harris and I ran Ms. Lamm down in her office on April 8, 1993. She said she would start going to AA meetings once she could get around better on her leg.

18. On the morning of April 23, 1993, Mr. Lawing called me and said that Ms. Lamm was in the office that morning, smelled of alcohol, and had fallen and cut herself over her eye badly. Before I could contact Bob Bradley, Mr. Lawing called again and said she had fallen again in the office, and he asked me to call the rescue squad as she would not go home or take herself to the hospital as he had asked her.

19. I did call the Rescue Squad which took her to Gaston Memorial Hospital, although she was released from the Emergency Room later that day.

20. Mr. Lawing informed me on April 27, 1993 that Ms. Lamm had not come to the office that day, and that when she did he was going to have to inform her that she could no longer rent office space because she had been intoxicated on two occasions in their offices within the last month.

21. I learned yesterday that Ms. Lamm was arrested for driving while impaired in Mecklenburg County on April 25, 1993, and is currently in the detox unit of Mercy Hospital in Charlotte, North Carolina.

22. In my opinion Ms. Lamm currently has a severe problem with alcohol so as to cause her to be imminent danger of committing malpractice, and I also consider this to be an ongoing problem that has only gotten worse with time.

This the 28th day of April, 1993.

/s/ Rachel Pickard
RACHEL PICKARD
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[Notary Omitted in Printing]

APPENDIX C

**[Filed Under Seal
CSC Gaston Co., N.C.
April 30, 1993]**

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

File No. ———

NORTH CAROLINA

GASTON COUNTY

IN RE: ANNE M. LAMM,
Respondent

AFFIDAVIT

I, Betty B. Jenkins, Clerk of Superior Court of Gaston County, North Carolina, being first duly sworn, depose and say as follows:

1. That Mr. Fletcher came into my office on December 22, 1992 and talked with me about the estate of his daughter. He informed me that he had been unable to get in touch with his attorney, Anne Lamm, and that he was going to prepare the Final Inventory himself.

2. On January 22, 1993 Mr. Fletcher again came into our office and was very upset. He told my Clerk, Mary Ann Auten, that an Amended 90 Day Inventory might need to be filed in the estate, and he said that Ms. Lamm had been drunk in her office the last time he had met with her.

3. The next Monday, on January 25, 1993 Mr. Fletcher came back to our office with Ms. Lamm, at which time he denied to me and my staff that he had said

Ms. Lamm had ever been intoxicated, which was exactly opposite of what he had told us three days previously.

4. At that time, I told Mr. Fletcher that from thence forward his attorney would be the only one to deal with the Clerk's Office regarding that particular estate, and I asked him to leave.

5. I also asked Ms. Lamm to leave, saying "Anne you need to leave as well because you have been drinking." She denied this, but I did smell the odor of alcohol about her person.

This the 30th day of April, 1993.

/s/ Betty B. Jenkins
BETTY B. JENKINS
Clerk of Superior Court
of Gaston County
Gaston County Courthouse
Gastonia, NC 28052
(704) 868-5810

[Notary Omitted in Printing]

APPENDIX D

**[Filed Under Seal
CSC Gaston Co., N.C.
April 30, 1993]**

NORTH CAROLINA
GASTON COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

File No. ———

IN RE: ANNE M. LAMM,
Respondent.

ORDER

THIS MATTER COMING ON TO BE HEARD in the chambers before the undersigned Resident Superior Court Judge of the Twenty-Seventh A Judicial District on the Petition of Rachel Pickard and Robert L. Bradley in this cause, and the Court having considered the petition and the affidavits of Rachel Pickard and Betty B. Jenkins, makes the following:

FINDINGS OF FACT

1. Anne M. Lamm is a citizen and resident of Gaston County, North Carolina, and is licensed by the North Carolina State Bar to practice law within the State of North Carolina and is subject to the jurisdiction of the North Carolina State Bar and the inherent power of this Court;

2. Two members of the Positive Action for Lawyers Committee of the North Carolina State Bar, namely Robert I. Bradley and Rachel Pickard, are of the opin-

ion that Anne M. Lamm is drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law, and the Executive Director of the State Bar and the Director of the PALS Committee concur in that opinion;

3. The respondent is drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law; and

4. The proceedings in this matter should be sealed.

Based upon the foregoing FINDINGS OF FACT, the Court makes the following:

CONCLUSIONS OF LAW

1. Anne M. Lamm is licensed by the North Carolina State Bar to practice law in the State of North Carolina and is subject to the jurisdiction of the North Carolina State Bar and the inherent power of this Court;

2. Anne M. Lamm is drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law;

3. The license of Anne M. Lamm to practice law in the State of North Carolina should be suspended for a period not to exceed 180 days or until such earlier date that this Court finds that Anne M. Lamm is no longer drinking alcohol and using mood altering drugs in sufficient amounts to impair her ability to practice law;

4. The petition and proceedings in this cause shall be sealed.

NOW, THEREFORE, IT IS HEREBY ORDERED, AS FOLLOWS:

1. The license of Anne M. Lamm to practice law in the State of North Carolina shall be, and the same is hereby, suspended for 180 days from the date of this Order, or until such earlier date as this Court shall find

that Anne M. Lamm is no longer drinking alcohol or using mood altering drugs in sufficient amounts to impair her ability to practice law;

2. All proceedings in this matter shall be sealed;

3. A copy of this Order shall be served upon Anne M. Lamm; and

4. Jurisdiction of this matter is retained for the entry of further orders.

This the 30th day of April, 1993.

/s/ Robert W. Kirby
Resident Superior Court Judge
Gaston County, North Carolina

APPENDIX E

ASSIGNMENTS OF ERROR BY APPELLANT

The trial court erred by entering its Order suspending Petitioner's license to practice law (R pp 10-11) and by denying Respondent's Rule 60(b)(4) Motion and Motion to Set Aside Order (R p 12) because:

1. Article VI, § 5i(6) of the Rules of the North Carolina State Bar, pursuant to which the proceeding below was brought, is vague and overbroad and substantively arbitrary, in violation of Article I, § 19 of the North Carolina Constitution and the Fourteenth Amendment to the United States Constitution.

2. The course of proceedings below and Article VI, § 5i(6) of the Rules of the North Carolina State Bar have, by their failure to give Respondent notice or an opportunity to be heard before being deprived of her liberty and property, violated the Fourteenth Amendment to the United States Constitution and Article I, § 19 of the North Carolina Constitution.

R pp 10-11, 19-25.